Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of Michelle L. Wightman, Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment is violated where a state imposes a $15,000,000 punitive damages award after a process that was fundamentally flawed because: (a) there existed a substantial possibility of judicial bias by the state's highest court that went unaddressed by that court when it affirmed the punitive damages award; and (b) the trial court prevented defendant from presenting its evidence with respect to defendant's reprehensibility and the circumstances of the accident, allowed the jury to hear only plaintiff's version of the case, and thereby deprived defendant of a full and fair opportunity to present its defense.

2. Whether, in determining if a punitive award is constitutionally proportional, the proper comparison is to the compensatory damages awarded for the cause of action for which the state makes punitive damages available, as the majority of lower courts have held, which in this case means that the punitive award is 6,250 times greater than the compensatory award, in clear violation of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

All of the parties to the proceeding are named in the caption. The parent companies of Consolidated Rail Corporation are Conrail, Inc., which is the 100% owner of Consolidated Rail Corporation; Green Acquisition Corporation, which is the 100% owner of Conrail, Inc.; and CRR Holdings LLC, which is the 100% owner of Green Acquisition Corporation. Norfolk Southern Corporation and CSX Corporation each own 50% of the stock of CRR Holdings LLC. The non-wholly owned subsidiaries of Consolidated Rail Corporation are LMS Partnership (50%) and Indiana Harbor Belt R.R. Company (51%).

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PETITION FOR A WRIT OF CERTIORARI

The history of this case begins with a trial in which a $25,000,000 punitive damages award based on a $2,400 compensatory damages award was imposed in a vacuum. There a jury – specially empaneled for the sole purpose of deciding the amount of punitive damages – was prohibited from hearing defendant's evidence about the circumstances of the accident, evidence that had led a prior jury to determine that the victim was 40% responsible for the accident and a prior judge to conclude that no punitive damages were warranted. The history ends with a state supreme court affirming an exorbitant punitive damages award, adding post-judgment interest to it, and declining to address defendant's motion to recuse two of that court's justices (one the author of the majority opinion) who had received substantial campaign contributions from plaintiff's lawyer and the lawyer's relatives while the appeal was pending before the court.

If there is one principle that is clear from this Court's punitive damages jurisprudence, it is this: whatever the result, the process leading to the imposition of punitive damages must be fundamentally fair or it violates the Due Process Clause of the Fourteenth Amendment. This petition requests review of the due process issues left open by this Court's decisions in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), namely, whether a state violates a litigant's rights under the Due Process Clause when it compels the litigant to pay $15,000,000 in punitive damages, plus post-judgment interest on that award, despite: (1) the existence of a serious question of partiality in the

state supreme court and that court's refusal even to address a motion to recuse two of its members on that basis; (2) the state courts' exclusion of defendant's evidence about the entirety of the circumstances leading up to the accident; and (3) a foundation of only $2,400 in compensatory damages for a punitive damages award of $15,000,000.

The important issues of this case will continue to perplex both state and federal courts, and will subject litigants to deprivations of property without due process of law, until this Court clarifies the pivotal holdings of *Gore*, *Oberg*, and *Lavoie*. Accordingly, *certiorari* is warranted in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 715 N.E.2d 546 (Ohio 1999), and appears in the Appendix at pages 1a-33a. The opinion of the Ohio Court of Appeals of Erie County, Ohio, which was affirmed in part and reversed in part by the Supreme Court of Ohio, is unpublished. App. 34a-49a. The Opinion and Order of the Common Pleas Court of Erie County, Ohio, granting in part Consolidated Rail Corporation's motion for a remittitur and denying its motion for a new trial, is unpublished. App. 50a-71a.

The Supreme Court of Ohio never ruled on petitioner's motion to recuse two of the justices of that court, who had received substantial campaign contributions

from plaintiff's lawyer and the lawyer's relatives while this case was pending before them.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered judgment on September 15, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

This case arises out of a February 1989 collision between a car driven by Michelle Wightman and a Consolidated Rail Corporation ("Conrail") train. A Conrail train lost pressure in its brake system and automatically came to a stop, approximately 200 feet east of a grade crossing in Sandusky, Ohio. The train was sufficiently

close to the grade crossing that it automatically activated the crossing's flashing lights and gate.

A number of vehicles, when confronted with the activated gate and flashing lights, turned back, but others proceeded through the crossing. Michelle Wightman, a 16-year old, inexperienced driver, who had consumed several alcoholic beverages on the night in question, chose to go past the flashing lights and maneuver around the gates. Before her vehicle cleared the crossing, another Conrail train, proceeding on an adjacent track, within the speed limit and with its whistle blowing and its headlights on, entered the crossing and struck the vehicle. Michelle Wightman died instantly and the car was destroyed.

Darlene Wightman ("Wightman"), Michelle Wightman's mother and the administratrix of her estate, sued Conrail in the Erie County Court of Common Pleas, asserting two claims: a wrongful death claim seeking compensatory damages, and a property damage claim seeking compensatory and punitive damages for the $2,400 in property damage to her car. Only compensatory damages are available for wrongful death under Ohio law; punitive damages are specifically prohibited for wrongful death claims. *See Rubeck v. Huffman*, 374 N.E.2d 411, 413 (Ohio 1978); *see also* Ohio Rev. Code Ann. § 2125.02(B) (Anderson 1998).

At trial, Conrail introduced evidence that Michelle Wightman had been drinking alcohol (supplied by her mother) prior to operating her mother's car. The jury found both Michelle Wightman and Conrail negligent, apportioning 60% of the liability to Conrail and 40% to

Michelle Wightman, and awarding Wightman $1,000,000 in compensatory damages on the wrongful death claim. App. 51a. The jury also determined that Conrail had acted with a conscious disregard for the safety of others, thereby giving rise to the possibility of punitive damages for the property damage claim. App. 52a.

At the time of the first trial, Ohio law required the judge to determine the amount of punitive damages upon a jury finding that the conduct met the standard for the imposition of a punitive award. On the basis of all of the evidence, including the evidence of Michelle Wightman's contributory fault, the trial judge determined that the proper amount of punitive damages was $0. App. 74a.

On cross-appeals, the Ohio Court of Appeals affirmed the compensatory damages award, reversed the trial court's decision to award no punitive damages on the property damage claim, and remanded the case for a determination as to the amount of punitive damages to be awarded on that claim. *Wightman v. Consolidated Rail Corp.*, 640 N.E.2d 1160 (Ohio Ct. App.), *appeal not allowed*, 638 N.E.2d 1044 (Ohio 1994). Shortly before the trial judge reconsidered the issue of punitive damages on remand, the Ohio Supreme Court held in an unrelated case, *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994), that the state constitution required that where a jury decides that defendant's conduct meets the standard for the imposition of punitive damages, the jury, not the trial judge, should decide the amount of punitive damages. Accordingly, a new jury was empaneled to determine the amount of punitive damages to be imposed.

In view of the procedural posture of the case, the second trial court then considered (in the context of motions *in limine*) what evidence it would allow the parties to present to the second jury. The trial court excluded Conrail's evidence regarding the circumstances of the accident – evidence that had led the first jury to find that Michelle Wightman was 40% contributorily negligent and the first judge to conclude that no punitive damages were warranted. App. 5a, 69a-70a. The trial judge also excluded Conrail's expert testimony that Michelle Wightman's age, driving inexperience, and use of alcohol increased the risk of the accident by 500%. Wightman, on the other hand, was permitted to put on her entire case against Conrail, as well as her expert testimony regarding the cause of the accident and Conrail's alleged misconduct.

As a result of this one-sided presentation, the jury awarded Wightman $25,000,000 in punitive damages tied exclusively to the $2,400 property damage claim. App. 5a. Conrail moved for a remittitur or a new trial, on the ground that the punitive damages award was impermissibly excessive and violated due process under both state law and the United States Constitution. App. 50a. The trial court granted Conrail's motion, in part, remitting the award to $15,000,000 and modified the judgment to exclude the running of post-judgment interest on the punitive damages award. Wightman consented to the remittitur, which included both the amount and the elimination of interest.

Conrail appealed, arguing, *inter alia*, that the trial court's evidentiary rulings and the amount of the punitive damages award, even as remitted, violated its rights

under state law, as well as under the Due Process Clause of the Fourteenth Amendment. App. 39a-40a. Wightman filed a cross-appeal, arguing, *inter alia*, that the trial court erred in disallowing post-judgment interest on the punitive damages award. The Ohio Court of Appeals affirmed the trial court's rulings in all respects. App. 49a.

Both parties sought review in the Supreme Court of Ohio. Conrail again raised the issues of the excessiveness of the punitive damages award and the impropriety of excluding Conrail's evidence concerning the cause of the accident under both state law and the United States Constitution. App. 8a, 12a. The Ohio Supreme Court granted review.

After the oral argument, Conrail obtained the final post-election campaign finance reports of two justices of the Ohio Supreme Court, Justice Francis E. Sweeney and Justice Paul E. Pfeifer, both of whom had been reelected just prior to the November 1998 argument. These reports stated that Wightman's counsel (who had the case on a 33$^{1}/_{3}$% contingency fee basis), his spouse, siblings, and their spouses and children, many of whom were lawyers at the same law firm, had collectively made $25,000 in campaign contributions to each Justice Sweeney and Justice Pfeifer in early 1998, at the time the case was pending before the court on petitions for discretionary review. App. 105a-106a. The amount contributed by plaintiff's lawyer and his relatives represented 4.4 percent of the total financial contribution to Justice Pfeifer's campaign during that period and 4.7 percent of the total contribution to Justice Sweeney's campaign during that period.

Immediately upon learning this information and *before any decision had been rendered by the Ohio Supreme Court,* Conrail filed a motion to recuse Justices Sweeney and Pfeifer due to the appearance of impropriety created by these substantial contributions made by plaintiff's lawyer and the lawyer's relatives during the pendency of the appeal. App. 75a-77a. The Ohio Supreme Court never ruled on the recusal motion.[1]

Instead, on September 15, 1999, the Ohio Supreme Court issued its opinion without even mentioning the recusal motion. App. 1a-33a. The court affirmed both the $15,000,000 punitive damages award and the rulings excluding Conrail's evidence, as comporting both with Ohio law and the Due Process Clause. App. 9a, 19a. It also made new law in Ohio by reversing the court of appeals' affirmance of the trial court's disallowance of post-judgment interest on the punitive damages award, thereby increasing Conrail's punishment by over $5 million. App. 25a. Both Justices Sweeney and Pfeifer participated in the decision and voted to affirm the punitive damages award, as well as to add the interest. Indeed, Justice Pfeifer authored the majority opinion.

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[1] Conrail filed its recusal motion under seal. However, no order ever was entered sealing the motion.

REASONS FOR GRANTING THE WRIT

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THE PROCESS THAT IS DUE BEFORE A STATE MAY IMPOSE A SUBSTANTIAL PUNITIVE DAMAGES AWARD.

This Court has made clear that the Due Process Clause applies in full force in the context of punitive damages. "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434-35 (1994). Specifically, in the punitive damages context, the Due Process Clause prevents state juries from imposing punitive damages awards without "adequate guidance from the court" and without full and fair appellate review to ensure that such awards are "reasonable" in relation to the goals of retribution and deterrence. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-21 (1991); *see also Oberg*, 512 U.S. at 430 ("When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.").

This petition presents two important issues that have not been resolved by this Court regarding the process that is due before a state may impose a substantial punitive damages award. The first issue involves the requirement of full and fair appellate review, and specifically poses the question whether such review is afforded when a state supreme court affirms a massive punitive damages award in the face of – and without ever addressing – a

motion to recuse two of the court's justices based on those justices having received substantial campaign contributions from plaintiff's lawyer and his relatives while the case was pending before the court.

The second issue involves the requirement of a jury's full consideration of the evidence, and specifically poses the question whether such consideration is afforded when the trial court excludes defendant's evidence with respect to the circumstances of the accident – evidence that had led a prior jury to determine that the victim was 40% contributorily negligent, and a prior judge to determine that no punitive damages should be awarded – leaving the jury to hear only plaintiff's version of the facts.

This case presents an opportunity for the Court to clarify its due process cases, and to provide much-needed guidance to state courts struggling with the required process and substance of punitive damages determinations and appellate review, in light of the Fourteenth Amendment's proscription against the deprivation of property without due process of law.

A. The Decision of the Supreme Court of Ohio Is Inconsistent with this Court's Decisions in *Lavoie* and *Oberg* Because it Allows Ohio To Impose a Substantial Punitive Damages Award Without Full and Fair Appellate Review.

The appearance of judicial partiality is grounds for vacating a punitive damages award under the Due Process Clause. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court overturned a substantial punitive

damages award that had been affirmed by the Alabama Supreme Court because a justice of that court was a litigant in an unrelated, but similar, case at the time he participated in the case at hand. The Court held that the justice's participation violated the defendant's due process right to a fair and impartial appellate tribunal, even though there was no evidence that the justice actually had been influenced by his stake in the other case. *See id.* at 825.

The incongruity between the due process requirement of an impartial judge and the appearance of impropriety created by lawyer contributions to judicial candidates has been of utmost concern to jurists and commentators alike. *See, e.g., Stretton v. Disciplinary Bd. of the Sup. Ct.*, 944 F.2d 137, 145 (3d Cir. 1991) ("There is no aspect of the electoral system of choosing judges that has drawn more vehement and justifiable criticism than the raising of campaign funds, particularly from lawyers and litigants likely to appear before the court."); *In re Mason*, 916 F.2d 384, 387 (7th Cir. 1990) (noting the "difficult case" that would be presented if an "attorney gave significant financial support to the judge's campaign committee" while the judge was deciding a case in which the attorney was involved).

Commentators also have noted the serious ethical and due process problems created when attorneys contribute significant amounts to judicial campaigns and then try cases or argue appeals before the jurists they supported. *See, e.g.*, Harold See, *Judicial Selection and Decisional Independence*, 61 Law & Contemp. Probs. 141, 142 (1998) ("To the extent the courts are not just another policymaking branch of government, but are performing

the function of assuring the rule of law, there may be a due process interest in protecting the judges' decisional independence from the immediate influence of various interest groups."); Roy A. Schotland, *Elective Judges' Campaign Financing*, 2 J. L. & Pol. 57, 90 (1985) (noting that judicial campaign funding "undermines respect for judicial integrity and impartiality"); Mark Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich. L. Rev. 382, 418 (1987) (arguing that significant campaign contributions can erode the impartiality that "is the very heart of due process"). In fact, in Ohio itself, a Citizens' Committee on Judicial Elections report issued in 1995 reported that 89% of Ohioans believe that judicial decisions are influenced at least some of the time by campaign contributions, while only 7% believe that they are never so influenced. *See* Jason Levien & Stacie L. Fatka, *Cleaning Up Judicial Elections*, 2 Mich. L. & Pol'y Rev. 71, 78 (1997); *see also* App. 91a n.8.

The principle at the heart of *Lavoie* is that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Even when actual bias is not shown, "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* This Court frequently has reaffirmed this "basic requirement of due process," *see, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), which provides a critical limitation on states' otherwise substantial discretion in ordering their judicial systems. In the context of judicial elections, large financial contributions to a judge from a lawyer with a case

pending before that judge certainly create the appearance of a *quid pro quo*, which violates the "basic requirement of due process" that a litigant be afforded a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136. This constitutional concern is even more acute when the contributing lawyer has millions of dollars in fees at stake in the outcome of a pending appeal.

Despite the clear rulings of this Court emphasizing the fundamental role of due process to ensure impartiality, this Court has yet to address whether a state may impose a substantial punitive damages award in the face of, and without addressing, serious allegations of judicial partiality. The failure of the Ohio Supreme Court to address Conrail's substantial contentions regarding two of that court's members is equivalent to the denial of judicial review that this Court in *Oberg* held violated due process. Further, the substance of the allegations in Conrail's motion to recuse raises significant questions regarding the "probability of unfairness," *Murchison*, 349 U.S. at 136, in the Ohio Supreme Court's adjudication of Conrail's appeal.

Given the broad use of judicial elections and thus the recurring risk of questionable contributions by the agents of parties with matters before judges seeking reelection, the Court should grant this petition in order to clarify the contours of the Due Process Clause in such situations in which the integrity of a state's appellate process has been called into question.

At least three factors elevate the ethical questions underlying the campaign contributions to Justices Pfeifer and Sweeney to the level of a due process violation. First,

the Supreme Court of Ohio failed to address the claim of potential bias and Conrail's request for recusal. The failure to act on this issue, intertwined with Conrail's substantive challenge to the $15,000,000 punitive damages award, constituted a lack of "meaningful and adequate" review of that award. *Haslip*, 499 U.S. at 20; *see Oberg*, 512 U.S. at 434-35. When raised in the context of a huge punitive damages award, where this Court has stated that due process requires the most exacting fairness in procedure, the appearance of judicial bias must be carefully scrutinized and fully addressed, not ignored, as here.

In addition, the level of the contributions in this case – $25,000 to each of the two justices in question at the very time these justices were considering this appeal – creates a significant danger of unfairness that raises not only ethical, but also due process, concerns. Indeed, recent amendments to the ABA's *Model Code of Judicial Conduct* provide for the disqualification of a judge from a proceeding in which an attorney has "made aggregate contributions to the judge's campaign in an amount that is greater" than the jurisdiction's statutory limit, including "contributions made indirectly." *Model Code of Judicial Conduct* Canon 3E(1)(e) (amended 1999). The combined contributions from plaintiff's lawyer and his family to Justices Sweeney and Pfeifer are far in excess of Ohio's statutory limit for individual contributions, and warrant disqualification not only under basic rules of judicial ethics, but also under due process principles established in a long line of cases from *Tumey* to *Lavoie*. *See* Gerald Uelmen, *Disqualification of Judges for Campaign Support or Opposition*, 3 Geo. J. Legal Ethics 419 (1990).

Moreover, at the time of these contributions, in January and early February 1998, the parties were seeking the state supreme court's discretionary review of the intermediate court's rulings. At stake for the law firm was its one-third share of a punitive damages award of as much as $25,000,000, plus interest, based on its contingency fee agreement. The discretionary appeal was allowed in late February 1998, shortly after the contributions were made; briefs were submitted in April through July 1998, during the election campaign; and oral argument was held just after the two justices were reelected, in November 1998. The appeal then was decided against Conrail: the punitive damages award was affirmed and the court for the first time ruled that post-judgment interest could run on punitive damages, thereby increasing the already excessive penalty by approximately one-third, or by more than $5,000,000.

Coupled with the amount of the contributions, the fact that they were made while the appeal was pending created a significant issue of impropriety that, rather than being addressed by the Ohio Supreme Court, was utterly ignored. In sum, this Court should grant the petition in order to clarify the requirements of the Due Process Clause in this context that implicates the fundamental fairness of Ohio's and other states' systems of electing judges and financing their campaigns.

B. The Decision of the Supreme Court of Ohio Is Inconsistent with this Court's Decisions in *Haslip* and *Oberg*, as Petitioner Has Been Deprived of Substantial Property Without the Basic Due Process Right of Being Permitted to Introduce Significant Relevant Evidence in its Own Defense.

In addition to the due process requirement of a fair and impartial judge, as well as the appearance thereof, a well-established component of due process is the right to present a defense, including all relevant evidence in support of one's defense, before a state may impose punishment. *See, e.g., Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam); *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). This axiom also applies in the punitive damages context. *See Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

Conrail's due process right to a fair trial was violated when the state jury was allowed to impose a substantial punishment without hearing all of the evidence bearing on the wrongfulness of Conrail's conduct. Specifically, the trial court, in a decision later ratified by the state's appellate courts, excluded *all* of Conrail's evidence that would have provided a complete and fair picture of the cause of the accident and of the factors outside of Conrail's control that increased the likelihood of the accident occurring. App. 69a-70a. This violated Conrail's right to a fair trial. *Cf. Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (holding that a retrial of less than all of the issues in a case may only be had when the issues are "distinct and separable"); *Smyth Sales, Inc. v. Petroleum Heat & Power Co.*, 141 F.2d 41, 45 (3d Cir. 1944)

("[T]he determination of the amount of punitive damages, if any, to be awarded . . . cannot appropriately take place except in connection with the consideration by the jury of the whole question of the defendant's liability and *of all the circumstances which it is asserted give rise to that liability.*" (emphasis added)).[2]

This Court's emphasis in the criminal context on the importance of a full and fair presentation of a party's defense is instructive here. For example, in *Chambers*, a state criminal defendant claimed that his due process rights were violated by state procedural rules and state court rulings that rendered him "only partially successful . . . in his efforts to bring before the jury the testimony supporting [his] defense." 410 U.S. at 289. The Court noted that a criminal defendant's right to due process is essentially "the right to a fair opportunity to defend against the State's accusations." *Id.* at 294. When a civil defendant faces a punitive damages award of as much as $25,000,000, and when the state's imposition of that award "is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment," *Oberg*, 512 U.S. at 435, this principle from *Chambers* is fully logical. The exclusion of Conrail's "critical evidence," *see Chambers*, 410 U.S. at 302, denied it the right to a fair opportunity to defend against the punitive damages claim, and led to a trial that was not "in accord

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[2] In addition, the court admitted plaintiff's expert testimony on 1,000 similar accidents that not only occurred outside of Ohio, but that did not even involve Conrail, leading to the possibility that the state imposed a punishment on a party for actions committed by unrelated (and unidentified) parties. *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559, 573-74 (1996).

with traditional and fundamental standards of due process." *Id.*; *see also Green*, 442 U.S. at 97 (holding that exclusion of testimony in a criminal trial that "was highly relevant to a critical issue in the punishment phase of the trial" denied the defendant a fair trial).

The unfairness caused by the exclusion of evidence in the second trial is made crystal-clear by a simple comparison of the result of that trial (a $25,000,000 punitive damages award) with the result of the first trial at which all the evidence was allowed (a 40% contributory negligence finding and a $0 punitive damages award). Clearly, the exclusion of the evidence of circumstances outside of Conrail's control that had led the first jury to find Michelle Wightman 40% responsible for the accident – including her age, alcohol consumption, and inexperience behind the wheel – as well as Conrail's expert testimony that would have established that the combination of those circumstances increased the likelihood of the accident by 500%, deprived Conrail of the opportunity to present circumstances in mitigation of an award that otherwise is virtually limitless. The jury did not even know that Conrail previously had paid $1,000,000 in compensatory damages on the wrongful death claim. If due process requires full and fair jury instructions before punitive damages can be imposed, *see Haslip*, 499 U.S. at 18-20, then, *a fortiori*, it requires a full and fair presentation of the evidence to the jury in the first place.

The one-sided presentation of the evidence led to a jury verdict that bore no relationship to the reprehensibility of Conrail's actions, to the actual damages to the plaintiff, or to the civil and criminal penalties that could have been imposed for Conrail's conduct. *See, e.g., Atlas*

Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 600 (4th Cir. 1996) (noting that a jury considering only punitive damages was properly told about the first jury's findings on liability and compensatory damages, as these "provided the jury with important background information"); *Fury Imports, Inc. v. Shakespeare Co.*, 554 F.2d 1376, 1389 (5th Cir. 1977) ("[A]n award of punitive damages should rest on the jury's assessment of all the evidence in the case."); *United Air Lines, Inc. v. Wiener*, 286 F.2d 302, 306 (9th Cir. 1961) (holding that, when punitive damages are at issue, "the defendant is entitled to show all of the facts surrounding the collision"); *Atlantic Coast Line R.R. v. Bennett*, 251 F.2d 934, 939 (4th Cir. 1958) ("[W]e are unable to say that the new trial can be restricted to the single issue [of punitive damages] without injustice to the defendant, since the evidence relating to wilful misconduct is so inextricably tied up with that relating to primary negligence that a fair trial upon either issue requires a trial of both issues together.").

In short, this petition presents significant constitutional questions with respect to the due process requirement of full and fair jury consideration, and specifically whether the evidence surrounding the incident in question must be presented to the jury before it can reach a rational determination of how much damages are appropriate to punish and deter the defendant. That issue warrants review by this Court.

II. *CERTIORARI* SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE LOWER COURTS REGARDING THE PROPER PROPORTIONALITY ANALYSIS WHEN REVIEWING A PUNITIVE DAMAGES AWARD.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held that imposition of a punitive damages award that was 500 times the amount of the actual harm to the plaintiff violated the defendant's due process rights. The Court focused on three "guideposts" in concluding that the defendant "did not receive adequate notice of the magnitude of the sanction that Alabama might impose" for its wrongdoing, leading the Court to conclude that the punitive damages award was "grossly excessive." 517 U.S. at 574-75. These guideposts included "the degree of reprehensibility" of defendant's actions, "the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award," and "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *Id.* at 575.[3]

The lower courts are in conflict on how to apply *Gore*'s second guidepost. In ascertaining whether a punitive damages award is proportionate to the compensatory damages, some courts have looked broadly at all of the defendant's acts in the case, and all of the causes of

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[3] In Part I.B *supra*, Conrail explained why its due process right to present all of the evidence bearing on the first of these factors – the degree of its reprehensibility – was violated by the state court's exclusion of its evidence at the punitive damages trial. *See supra* at 16-19.

action, whether or not those acts and causes of action gave rise to a punitive damages award. On the other hand, other courts have focused – appropriately, in Conrail's view – only on the particular cause or causes of action that gave rise to the punitive damages award. The Court should grant the petition in order to provide clear guidance to the state and federal courts that must resolve these issues on a daily basis.

A. There Is a Conflict among the Lower Courts Regarding the Proper Foundation for Measuring the Proportionality of a Punitive Damages Award.

This Court in *Gore* reiterated its holdings in *Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), "that a comparison between the compensatory award and the punitive award is significant." *Gore*, 517 U.S. at 581. In *Haslip*, a ratio of punitive to compensatory damages of four to one was found to be "close to the line," but still constitutionally permissible. *Haslip*, 499 U.S. at 23-24. In *TXO*, where this Court described defendant's conduct as consisting of "fraud, trickery and deceit," the ratio of punitive damages to "potential harm" (which took into account not the actual pecuniary loss, but the potential loss to plaintiffs) was ten to one, a ratio that was found not to be "grossly excessive." *TXO*, 509 U.S. at 462. In *Gore*, the Court held that a ratio of 500 to 1 was "breathtaking," and "must surely 'raise a suspicious judicial eyebrow.' " *Gore*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting)).

The ratio here is 6,250 to 1. Compensatory damages for the only claim under Ohio law that carried with it the possibility of punitive damages (*i.e.*, the property damage claim) were $2,400.[4] On this foundation stands a "breath-taking" punitive damages award of $15,000,000. The Ohio Supreme Court justified this proportion by focusing on Conrail's conduct in its entirety, rather than focusing solely on the property damage claim that gave rise to the punitive damages award, thereby, in essence, punishing Conrail for the wrongful death claim on which no punitive damages were (or could have been) awarded.

It is this difficulty that has confounded the lower courts, which have split over whether the "egregious act" encompasses all of plaintiff's claims or simply those claims on which punitive damages may properly be awarded. Many courts, both before and since the *Gore* decision, have held that the proportionality of punitive damages awards may be analyzed in relation only to those compensatory claims that carry with them the possibility of punitive damages. *See, e.g., Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1132 (9th Cir. 1997); *Jeppesen v. Rust*, 8 F.3d 1235, 1239 (7th Cir. 1993); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1043 (S.D. Ind. 1997), *aff'd in relevant part*, 142 F.3d 367, 371 (7th Cir. 1998); *Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 786 (N.D. Ind. 1996); *Grynberg v. Citation Oil & Gas*

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[4] Under Ohio law, punitive damages may not be assessed in a wrongful death action. *See Rubeck v. Huffman*, 374 N.E.2d 411, 413 (Ohio 1978); *see also* Ohio Rev. Code Ann. § 2125.02(B) (Anderson 1998). Therefore, the punitive damages of $15,000,000 in this case were based entirely on the $2,400 of property damage.

Corp., 573 N.W.2d 493, 501 n.4, 504 (S.D. 1997). Other courts, however, have evaluated punitive damages awards by considering all of the damages awarded to a plaintiff, including amounts awarded for claims that would not themselves be subject to punitive damages. *See, e.g., Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403, 415 (S.D.N.Y. 1996); *Walston v. Monumental Life Ins. Co.*, 923 P.2d 456, 468 (Idaho 1996).

The former approach not only is appropriate, but also is constitutionally required. Otherwise, the very process designed to protect a defendant's constitutional rights when punitive damages are imposed would yield the anomalous result of sanctioning a punitive damages award based in part on conduct that the state already has determined does not warrant the imposition of such damages. In view of this Court's recognition that a state imposes punitive damages to serve state interests, *Gore*, 517 U.S. at 568-69, a punitive damages award that takes into account conduct that a state already has determined it has no interest in punishing violates due process. At a minimum, this creates a serious question of the adequacy of notice that is a fundamental component of due process.

This Court should resolve the conflict among the lower courts by granting this petition and holding that, in undertaking the constitutionally-required proportionality analysis, courts should use as the foundation for determining the punitive-to-compensatory ratio only the compensatory damages arising from those claims actually subject to punitive damages and on which punitive damages actually were awarded. Although Conrail believes

that a punitive damages award of $15,000,000 is constitutionally excessive even if it could be compared to a compensatory damages award of $1,000,000 (the amount awarded for the wrongful death claim in this case), this case presents a stark opportunity for the Court to resolve the lower-court split concerning proportionately because there can be no doubt that the proper foundation for the punitive damages award in this case – the $2,400 of property damage to Darlene Wightman's car – was far too small to support a punitive award of $15,000,000.

B. A Punitive Damages Award That Is 6,250 Times Greater than the Compensatory Award on Which it Is Based Is Grossly Excessive and Violative of the Due Process Clause of the Fourteenth Amendment.

Once the proper foundation is established for the proportionality analysis, the punitive damages award in this case cannot stand, as a ratio of 6,250 to 1 is drastically greater than the ratio found constitutionally deficient in *Gore*. The Ohio Supreme Court dismissed this Court's direction in *Gore* that the Constitution requires a reasonable ratio between punitive and compensatory damages. *See* App. 17a. ("We see the ratio between the compensatory and punitive damages as less relevant here because of the egregiousness of the act."). However, as this Court made clear in *Gore*, the proportionality factor is separate and distinct from the reprehensibility factor; state courts are not free to disregard the proportionality factor and allow a 6,250 to 1 ratio based on their own assessment of the "egregiousness of the act."

To be sure, this Court has eschewed simple mathematical formulae for determining when a ratio is constitutionally excessive. *See Gore*, 517 U.S. at 582. However, the extremely high ratio in this case, coupled with the state courts' denial of Conrail's due process right to present all of the relevant evidence bearing on the reprehensibility of its conduct and the much higher punitive sanction imposed in this case as compared to similar penalties under state and federal law, lead to the inevitable conclusion that the punitive damages award violates the Due Process Clause.

* * *

At the end of the day, the punitive award in this case is the product of a deeply-flawed process that excluded Conrail's ability to demonstrate that mitigating circumstances existed. Punitive damages carry no inherent limitations, which makes the defendant's ability to put on a complete case absolutely critical to ensure that the award is the product of a fair process. The trial error was compounded by the failure of the state to ensure an impartial appellate tribunal to review the propriety of the underlying award under both state and federal law. The consequence of those procedural missteps is a final punitive award run amok, one that bears no rational relationship to the compensatory award upon which it is based.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: December 3, 1999.

No. _____

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of Michelle L. Wightman, Deceased; Michelle Wightman Charitable Foundation,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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WIGHTMAN et al., Appellants and Cross-Appelees,
v.
CONSOLIDATED RAIL CORPORATION, Appellee and Cross-Appellant.

No. 97-2342.

Supreme Court of Ohio
Submitted Nov. 10, 1998.
Decided Sept. 15, 1999.

Syllabus by the Court

A plaintiff who accepts a remittitur may appeal the trial court's determination of the damage issue if the opposing party appeals any issue. If the reviewing court finds no error as to the determination of damages, the plaintiff's prior acceptance of judgment for the reduced amount will be affirmed unless the result of the principal appeal requires otherwise.

On February 18, 1989, a Consolidated Rail Corporation ("Conrail") freight train collided with a car driven by Michelle Wightman, killing her and her passenger, Karrie Wieber. Michelle's mother, Darlene M. Wightman, owned the car. Darlene Wightman sued Conrail as administrator of her daughter's estate for wrongful death and on her own behalf for the destruction of her automobile.

The collision occurred as Michelle Wightman attempted to negotiate a railroad crossing on Remington Avenue in Sandusky. A Conrail train, SEEL-7, had experienced mechanical difficulty and sat stopped on the track approximately two-hundred eight feet from the grade crossing at Remington Avenue. Due to its position when

it stopped, SEEL-7 activated the crossing's flashing lights and gates.

Witnesses differed on how long SEEL-7 was stopped prior to the crash. One witness estimated that he first observed the stopped train at about 10:30 p.m., about ninety minutes prior to the crash. The train's crew estimated that the train had stopped somewhere between 11:00 p.m. and 11:30 p.m. SEEL-7's conductor, Terry Warner, and its head brakeman, Leroy Powell, saw that the gate arms were down at the crossing and that traffic was nonetheless proceeding. They recognized that a dangerous situation existed at the crossing. However, they decided not to post a flagman at the crossing, and instead the two walked the length of the train to find and repair the mechanical problem. Warner described their decision as "our only option."

The engineer in SEEL-7's lead engine also saw the heavy Saturday evening traffic moving over the crossing. He saw no one attempting to turn around and avoid the crossing. While SEEL-7 was stopped, another train, TVLA, went over the crossing without incident, traveling at about seventy miles per hour. Radio communications alerted the SEEL-7 crew that another train, TV-9, was approaching the crossing. TV-9 would ultimately smash into the car driven by Michelle Wightman.

About twenty minutes prior to the crash, a Sandusky police officer, Lonnie Newell, came upon the scene. Officer Newell saw that SEEL-7 created a dangerous obstruction and requested his dispatcher to advise Conrail of the situation. Satisfied that Conrail had been notified, Officer Newell left the crossing to undertake a traffic stop and

issue a verbal warning to a driver who had driven around the gates.

Shortly after Officer Newell left the scene, sixteen-year-old Michelle Wightman approached the crossing. Several cars in front of the Wightman car successfully proceeded over the crossing. Michelle Wightman slowly followed. But, as one witness said, "They didn't have a chance * * * ." Before the Wightman car cleared the crossing, the TV-9 train emerged at a speed of almost sixty miles per hour and struck the car broadside, instantly killing both occupants.

On October 30, 1990, a jury awarded the estate of Michelle Wightman $1,000,000 in compensatory damages, allocating sixty percent of the causal negligence to Conrail and forty percent to Michelle Wightman. The jury also found Conrail liable for the damage to Darlene Wightman's property and determined that Conrail should pay punitive damages on Darlene Wightman's claim.

At the time of the trial, former R.C. 2315.21(C)(2) provided for bench proceedings to determine the amount of punitive damages. The trial judge held that no punitive damages should be awarded.

The Sixth District Court of Appeals upheld the compensatory award to the estate, but reversed the trial court's failure to award punitive damages on Darlene Wightman's claim. The appellate court found "that there was clear and convincing evidence to support the jury's finding of actual malice on the part of appellant [Conrail]." 94 Ohio App.3d 389, 408, 640 N.E.2d 1160, 1173. The appellate court remanded the matter to the trial court "for determination as to the amount of punitive damages

to which appellee, Darlene Wightman, is entitled in accordance with this opinion." *Id.* at 409, 640 N.E.2d at 1173. On September 14, 1994, this court declined to hear Conrail's appeal. 70 Ohio St.3d 1442, 638 N.E.2d 1044.

After the case was remanded to the trial court, but before the trial court entered an amount of punitive damages, this court declared R.C. 2315.21(C)(2) unconstitutional as a violation of the right to trial by jury. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, paragraph two of the syllabus. Therefore, the amount of punitive damages to assess against Conrail became a jury issue.

A second jury was convened to determine that issue, and that trial began on May 20, 1996. On that same date, the trial court granted the motion to intervene of the Michelle Wightman Charitable Foundation, to which Darlene Wightman had apparently assigned not less than one-half of any punitive damages award. The foundation was not permitted to participate in the trial, however.

At the trial, the plaintiffs presented evidence of the events surrounding the collision, and that evidence generally mirrored the evidence that had been presented in the first trial. The jury heard testimony from plaintiffs' expert, Dr. William D. Berg, a civil engineer with special interest in grade-crossing safety. According to Dr. Berg, the railroad industry has known for decades that when gates at a crossing are allowed to remain down for an unusual length of time, drivers will proceed over the crossing. He testified that the danger of a crash is particularly great when there is an obstruction on the track. Dr. Berg testified that a large number of the collisions that

occur every year at grade crossings happen under conditions "substantially similar" to those which existed at Remington Avenue.

Dr. Berg testified that Conrail could have easily prevented the collision by placing a flagman at the crossing to stop traffic when a train was approaching, slowing the speed of the TV-9, or blocking the crossing with the SEEL-7 engine when a train was approaching.

The trial court prohibited Conrail from introducing evidence it had introduced at the first trial regarding certain circumstances surrounding the accident, which focused for the most part on the contributory negligence of Michelle Wightman. The court granted plaintiffs' motions *in limine* regarding evidence of Michelle Wightman's .039 percent blood-alcohol level at the time of the accident, and evidence that her mother may have provided her with some alcohol. The court also granted plaintiffs' motion *in limine* regarding the testimony from a Conrail expert regarding the effect that alcohol and a driver's age might have in a railroad-crossing collision. The court found that the negligence of Michelle Wightman was not a part of the punitive damages case.

The court also granted plaintiffs' motions *in limine* regarding the first trial judge's decision to award no punitive damages and to references that the first jury had found Michelle forty percent contributorily negligent. The court also prohibited references to the fact that Conrail had paid $1,000,000 in compensatory damages for the wrongful death of Michelle Wightman.

On May 23, 1996, the jury awarded Darlene Wightman $25,000,000 in punitive damages against Conrail. On

June 7, 1996, Conrail filed a motion for remittitur or, in the alternative, for a new trial. The railroad's motion also sought relief from post-judgment interest on the punitive damages award.

The court granted a remittitur of $10,000,000, finding that a $15,000,000 punitive damages award would "sufficiently punish Conrail and create a positive inducement to change its practices, rather than continue to challenge the findings of the earlier jury and the Court of Appeals."

The trial court also granted Conrail relief from post-judgment interest, despite finding "no conclusive authority in support of Conrail's request." The trial court reasoned that since punitive damages are not compensatory, interest on the amount to compensate for delay in payment may not be necessary.

Darlene Wightman consented to the remittitur, but both parties appealed aspects of the trial court's ruling. Conrail appealed the jury award as grossly excessive, and also appealed the trial court's aforementioned evidentiary rulings. Conrail also claimed that the trial court erred in admitting Dr. Berg's testimony.

Darlene Wightman cross-appealed, challenging the remittitur. Darlene Wightman also appealed the trial court's grant of relief from post-judgment interest on the punitive damages award.

The court of appeals affirmed the trial court in all regards. The court found the remittitur not appealable pursuant to this court's decision in *Scioto Mem. Hosp. Assn. v. Price Waterhouse* (1996), 74 Ohio St.3d 474, 479, 659 N.E.2d 1268, 1273. Plaintiffs had urged the court to

adopt the "Wisconsin rule" regarding the appealability of remittiturs, whereby a plaintiff may appeal a remittitur to which it consents if the defendant first initiates an appeal. The appellate court declined to adopt the Wisconsin rule. Both parties have appealed to this court.

The cause is before this court upon the allowance of a discretionary appeal and cross-appeal.

Murray & Murray Co., L.P.A., Thomas J. Murrary and Mary O'Neill, Sandusky, for appellant and cross-appellee Darlene M. Wightman.

Cavitch, Familo, Durkin & Frutkin, Harvey L. Frutkin and Kerin Lyn Kaminski, Cleveland, for appellant and cross-appellee Michelle Wightman Charitable Foundation.

Ralph G. Wellington, pro hac vice, Nancy Winkleman, pro hac vice, and Arlin M. Adams, pro hac vice; Vogelgesang, Howes, Lindamood & Brunn, Philip E. Howes and Thomas R. Himmelspach, Canton, for appellee and cross-appellant Consolidated Rail Corporation.

David E. Neumeister, pro hac vice, James K. Horstman, Richard Hodyl and Lloyd E. Williams, Jr., urging reversal on cross-appeal for amici curiae, National Association of Independent Insurers and Alliance of American Insurers.

Stanton G. Darling II, Columbus, urging reversal on cross-appeal for amici curiae, Product Liability Advisory Counsel and National Association of Manufacturers.

Buckingham, Doolittle & Burroughs, L.L.P., and Scott A. Richardson, Canton, urging reversal on cross-appeal

for amicus curiae, Ohio Association of Civil Trial Attorneys.

Allen Schulman & Assocs. Co., L.P.A., and Allen Schulman, Jr., Columbus; Clark, Perdue, Roberts & Scott Co., L.P.A., and Paul O. Scott, Columbus, urging reversal on appeal for amicus curiae, Ohio Academy of Trial Lawyers.

Squire, Sanders & Dempsey and Charles F. Clarke, Cleveland, urging reversal on cross-appeal for amicus curiae, Association of American Railroads.

PFEIFER, J.

We affirm the lower court decisions on evidentiary matters in this case. We find that the punitive damages award with remittitur is not excessive and is constitutional. We reverse the lower court on the issue of appealability of a remittitur and adopt the "Wisconsin rule" on that issue. We find that the trial court did not abuse its discretion in ordering a remittitur. Finally, we reverse the lower court on the issue of relief from post-judgment interest on a punitive damages award.

Evidentiary Issues

We find that the trial court acted within its discretion in granting the motions *in limine* that plaintiffs sought. Despite its claims to the contrary, Conrail was not precluded from mounting a defense.

The purpose of the latest incarnation of this case was to determine how much Conrail should pay in punitive damages. Liability and actual malice on the part of Conrail had already been determined at an earlier trial. This

court held in *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520, 524-525, 575 N.E.2d 453, 456, that "[a]cts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent" and, therefore contributory negligence is not available as a defense where conduct in conscious disregard has been established. Thus, since contributory negligence was not a part of this case, the trial court properly prevented the introduction of evidence that Michelle Wightman had consumed a small amount of alcohol prior to the collision, and that the alcohol may have been provided to her by her mother. The testimony of Dr. Herbert Moskowitz was based on the effects Michelle Wightman's youth and drinking might have on the accident, and was also properly excluded.

Conrail also sought to have introduced to the jury certain findings from the first trial, including the compensatory damages paid to the estate and the trial judge's decision to award no punitive damages. We find that the trial court properly granted plaintiffs' motions *in limine* on those issues. The amount of compensatory damages awarded in the first trial to the estate is irrelevant to the punitive damages claim of Mrs. Wightman. Finally, the fact that the first trial judge abused his discretion and failed to award punitive damages is also irrelevant to the later punitive damages trial.

Conrail also contends that the trial court erred in admitting certain testimony of plaintiff's expert, Dr. William Berg. Conrail objects to Dr. Berg's statement that, based on the statistics he has maintained for over twenty years, there are "in the order of 1,000 vehicle train collisions that were of magnitude that occurred at crossings

that didn't have automatic warning devices, including gates per year." Dr. Berg also testified that "a large number of these collisions are occurring in situations that are substantially similar. And when I say substantially similar, what I'm saying is where you have got a loss of credibility because the signals are operative for an extended period of time and when you've got the obstructions."

Conrail argues that Dr. Berg's testimony failed to meet the requirements of Evid.R. 703 and 705. Evid.R. 703 provides as follows:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

Evid.R. 705 states:

"The expert may testify in terms of opinion or inference and give his reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise."

Conrail asserts that Dr. Berg's testimony violated Evid.R. 703 because he had no personal knowledge of the statistics he cited, and the statistics had not been introduced into evidence. With respect to Evid.R. 705, Conrail asserts that Dr. Berg did not identify the person or organization that maintains those statistics and did not disclose where the statistics are published.

The decision of whether or not to admit evidence rests in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *Peters v. Ohio*

State Lottery Comm. (1992), 63 Ohio St.3d 296, 299, 587 N.E.2d 290, 292.

We find that the trial court did not err in allowing Dr. Berg's testimony. There are certain things that an expert, by reason of his expertise, knows. Conrail does not claim that Dr. Berg did not qualify as an expert under Evid. R. 702. When providing background information, and not opining as to causation, we cannot expect an expert to footnote every statement with a recitation of his direct observation of the phenomenon, or a bibliography explaining how he knows his statement to be true.

Dr. Berg was merely testifying as to facts in his area of expertise. A distinction can be made between background information and an opinion about causation. A doctor testifying in a medical malpractice case regarding a failed heart surgery, for instance, need not set forth the underlying facts regarding his knowledge of the basic makeup of the thoracic cavity. He does, however, have to set forth the facts underlying his opinion as to what caused the procedure to fail.

Dr. Berg was setting forth background information so that the jury could draw its own conclusion. When testifying as to broad patterns rather than specific opinions, the same level of foundation is not required.

Dr. Berg was open to aggressive cross-examination if Conrail thought his statistics were skewed or inaccurate. He was also open to rebuttal from Conrail witnesses. The trial court acted within its discretion in allowing the testimony of Dr. Berg.

We therefore affirm the court of appeals on all of the evidentiary issues.

Excessiveness of Punitive Damages Award

Conrail argues that the punitive damages award of $15,000,000 was grossly excessive and violated both Ohio law and the Due Process Clause of the United States Constitution. Conrail bases much of its argument regarding Ohio law on the ratio between the compensatory damage award and the punitive damages award. Mrs. Wightman's property loss was $2,400, and upon that loss was based the $15,000,000 punitive damages award, an amount 6,250 times greater than the compensatory award.

In its brief, Conrail provides a survey of Ohio cases from October 1, 1986 to "the beginning of 1997" in which punitive damages were awarded, concluding that the greatest disparity between punitive and compensatory damages was 600 to 1. (Conrail conveniently ends its survey in "the beginning of 1997" before the award of a $6,000,000 punitive damages award on a $100 property damage claim, a 60,000 to 1 ratio, in *Garrett v. Consolidated Rail Corp.* [1997], 120 Ohio App.3d 378, 697 N.E.2d 1109, discretionary appeals not allowed in 80 Ohio St.3d 1444, 686 N.E.2d 273.) Conrail thus seems to indicate that if Michelle Wightman had been driving a car worth $25,000, a 600 to 1 ratio, the punitive damages award in this case would have been acceptable. Conrail's attempted use of ratios exemplifies why the determination of punitive damages is not a mathematical process.

This court has stated that simply a large disparity between actual and punitive damages is not enough to set aside a jury's punitive damages award:

"Low compensatory damages and high punitive damages assessed by a jury are not in and of themselves cause to reverse the judgment or to grant a remittitur, since it is the function of the jury to assess the damages and, generally, it is not for the trial or appellate court to substitute its judgment for that of the trier of fact. A large disparity, standing alone, is insufficient to justify a court's interference with the province of the jury." *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464, 469.

A large disparity is allowable because a punitive damages award is more about a defendant's behavior than the plaintiff's loss. "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 651, 635 N.E.2d 331, 343. The value of the car Michelle Wightman was driving has little to do with how a jury might effectively and fairly punish and deter Conrail's conduct regarding the operation of its crossings. Tellingly, Conrail makes no argument that the punitive damages award was disproportionate as to its own income or net worth, but only that it was disproportionate to the value of the Wightman car.

The trial judge in this case did an in-depth analysis of the appropriateness of the jury's award. He found an award of $15,000,000 to be appropriate. We have held that "the trial judge is in the best position to determine whether an award is so excessive as to be deemed a

product of passion or prejudice." *Villella*, 45 Ohio St.3d at 40, 543 N.E.2d at 469. The trial judge believed a deterrent effect was necessary for Conrail because it was unwilling to accept responsibility for the collision. The trial judge found that Conrail's trial strategy "reflects a corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced this catastrophic collision needs to be changed."

A substantial harm, a continuing risk, a deterrent effect, and an economically viable company are factors that make a significant punitive damages award appropriate in this case. We find that the punitive damages award was not excessive and did not violate Conrail's rights under Ohio law.

Conrail also claims that the punitive damages award violates Conrail's due process rights under the United States Constitution. The United States Supreme Court has held that an award violates due process when it can be categorized as "grossly excessive" in relation to the state's legitimate interests in punishing unlawful conduct and deterring its repetition. *TXO Production Corp. v. Alliance Resources Corp.* (1993), 509 U.S. 443, 456, 113 S.Ct. 2711, 2719, 125 L.Ed.2d 366, 378.

In *BMW of N. Am, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, the court held that elemental notions of fairness "dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." 517 U.S. 574, 116 S.Ct. at 1598, 134 L.Ed.2d at 826. The court discussed three guideposts that indicate whether a defendant has received adequate

notice of the possible sanction. A lack of fair notice may render a sanction "grossly excessive."

The guideposts set forth in *BMW* include the degree of reprehensibility of the defendant's conduct, the disparity between the harm suffered by the plaintiff and the amount of the punitive damages award, and the difference between the punitive damages award and civil or criminal penalties authorized or imposed in similar cases. 517 U.S. at 574-575, 116 S.Ct. at 1598-1599, 134 L.Ed.2d at 826. In *BMW*, the defendant sold a car to the plaintiff without disclosing that it had been damaged during shipping and had been repainted. Defendant, the national distributor of BMW automobiles, had a company policy of repainting cars that suffered minor, predelivery damage. The defendant notified neither its dealers nor its customers of the damage. The policy affected about one thousand automobiles. The trial jury awarded plaintiff $4,000 in compensatory damages and $4,000,000 in punitive damages. On appeal the Alabama Supreme Court ordered a remittitur in the amount of $2,000,000.

The court in *BMW* described the degree of reprehensibility of the defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." 517 U.S. at 575, 116 S.Ct. at 1599, 134 L.Ed.2d at 826. In overturning the punitive damages award in *BMW*, the court made a special note that the harm inflicted on the plaintiff was purely economic in nature. The court stated that "BMWs conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at 576, 116 S.Ct. at 1599, 134 L.Ed.2d at 827.

It is with this guidepost, the most important one, that this case distinguishes itself the most from *BMW*. Ineffective gates at a railroad crossing are of a completely different character than a painted-over scratch on a luxury automobile. Literally and figuratively, we are dealing with the difference between a scratch and a cataclysm – the difference between a practice that might affect the value of an automobile by ten percent, and a practice that could result in massive property damage, physical injuries, and untold psychological pain. Conrail evinced a disregard of the danger it posed to the health and safety of motorists.

In this case, Conrail employees did nothing to warn drivers of oncoming trains, despite the fact that they saw vehicles crossing the track by driving around the gates. Even after a phone call from police, Conrail did not take preventative measures to avert an accident. According to the trial judge, this tragic case has done little to persuade Conrail to change, citing Conrail's "corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced the catastrophic collision needs to be changed."

We find that Conrail's conduct reaches the level of reprehensibility sufficient to warrant the substantial punitive damages award the jury imposed in this case.

The "second * * * indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." 517 U.S. at 580, 116 S.Ct. at 1601, 134 L.Ed.2d at 829. The Supreme Court has stated that the harm can include the harm likely to result from the defendant's conduct as well as the harm that

actually has occurred. 517 U.S. at 581, 116 S.Ct. at 1602, 134 L.Ed.2d at 830. But the court, like this court, has consistently rejected the notion of a bright-line mathematical formula for the computation of the reasonableness of punitive damages awards. The court recognizes that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." 517 U.S. at 582, 116 S.Ct. at 1602, 134 L.Ed.2d at 831.

We see the ratio between the compensatory and punitive damages as less relevant here because of the egregiousness of the act. The injury here was catastrophic and could have been financially more so. We are not persuaded that if Michelle Wightman had been driving a $40,000 BMW that would make a more acceptable ratio. An expensive car does not make the award more legitimate. The award stands on its own. This case offers one of those particular instances where a particularly egregious act has resulted in a small amount of economic damages.

The third guidepost set forth in the *BMW* case is comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct. In *BMW*, the court looked to the plaintiff's home state's Deceptive Trade Practices Act, which had a maximum penalty of $2,000. The court reasoned that the amount would not provide an out-of-state distributor with fair notice that a violation might subject an offender to a multimillion-dollar penalty. *Id.* at 584, 116 S.Ct. at 1603, 134 L.Ed.2d at 832.

Conrail claims to have violated no Ohio statutes on the night of the accident. Conrail argues that even if it had not fully complied with all laws, the maximum federal penalty for the willful failure to comply with an order to remedy a violation of signal-system safety regulations that creates an imminent danger of death or injury is $22,000 per violation. Section 209.409, Title 49, C.F.R.

But the *BMW* case and its civil penalties are a world away from this case. *BMW* requires that the penalties imposed be for comparable misconduct. In *BMW*, the $2,000 fine actually applied to the specific conduct of the defendant that was at issue. The $22,000 fine Conrail refers to does not apply to the specific conduct involved in this case. The $22,000 fine applies to the failure to comply with an order to remedy a violation of signal-system safety regulations. An order has to have been made and disregarded by the railroad company for the fine to be imposed. It is not a fine for causing a death.

The far more relevant civil "penalty" in cases like these is the potential civil damage award in a lawsuit. We agree with the trial court that Conrail could expect extraordinary civil damages from collisions it causes. Multiple passenger accidents where severe injuries occur could yield civil damage awards in the millions of dollars. Conrail could see this coming.

There are no comparable statutory fines in this case to compare how the state deals with similar malfeasance. The trial court felt that criminal sanctions may have been in order in this case. The judge opined that "had the appropriate prosecuting authorities been made aware of all the facts and circumstances surrounding this tragic

and unnecessary collision, those authorities would have been compelled to consider criminal prosecution, possibly for involuntary manslaughter."

Thus, we conclude that the applicable criminal and civil penalties available were comparable to the punitive damages award.

In considering the three guideposts set forth by the court in *BMW*, we find that Conrail had fair notice of the conduct that would subject it to punishment as well as the severity of the possible punishment. The award in this case was not grossly excessive and did not violate Conrail's due process rights.

We therefore affirm the lower court on this issue.

Appealability of Remittitur by Plaintiffs

Plaintiffs sought appellate review of the trial court's remittitur, arguing that since the court failed to find that the jury's award was excessive, remittitur was unavailable. Plaintiffs' first hurdle in that regard is the issue of the apppealability of a remittitur. In *Scioto Mem. Hosp. Assn. v. Price Waterhouse* (1996), 74 Ohio St.3d 474, 479, 659 N.E.2d 1268, 1273, this court stated that "where a party voluntarily chooses to accept a remittitur, rather than a new trial, it cannot challenge that remittitur on appeal. *Iron RR. Co. v. Mowery* (1881), 36 Ohio St. 418, paragraph three of the syllabus." This court found the rule against appeal of remittiturs to be "fundamentally fair, as it simply binds a party to its election." *Id.*

The different circumstances that this case presents have caused us to reconsider our endorsement in *Scioto* of *Iron RR.* There are issues of fairness and judicial economy

surrounding this remittitur that were not a part of the case in *Scioto*. And certainly now judicial economy plays a more important role in our justice system than in did when *Iron RR* was decided in 1881.

Here, the trial court ordered the remittitur; in *Scioto*, it was the appellate court. The benefits to judicial economy are greater with a trial-level remittitur. Secondly, in this case the appropriateness of the punitive damages award was at the center of defendant's appeal. We question the fairness of allowing one party to challenge the award without also allowing the other party to voice her own argument.

This case has given us an opportunity to consider the value of remittitur and to contemplate the policy that best and most fairly supports its purposes.

Overall, this case presents a compelling example of the worth of remittitur. The trial court's rationale in ordering remittitur was well intentioned. The court wrote in its opinion:

"This Court is concerned that if it simply overrules Conrail's motion lengthy appeals will ensure with potentially grave consequences for the safety of motorists using Conrail grade crossings. The Court, therefore, feels compelled, as a matter of public safety, to do everything in its power to [e]nsure that the purpose of punitive damages is promptly effectuated and that Conrail promptly changes the practice which produced this unnecessary tragedy. After much reflection, this Court has concluded that the most effective way to deter Conrail from continuing this practice is to remit the jury's verdict to an amount which would sufficiently punish

Conrail and create a positive inducement to change its practices, rather than to challenge the findings of the earlier jury and the Court of Appeals."

Remittitur plays an important role in judicial economy by encouraging an end to litigation rather than a new trial. The trial court sets forth persuasively the great value of a conclusion. There are times when an end has its own value, with justice delivered, and not further delayed. A final judgment brings closure, certainty, and possibly a commitment to changed future behavior. These are societal benefits as well as benefits to the parties. Wrongs are righted through judgments. Our justice system does not work without finality. Until then, the system's great value is in limbo. We take little from it, but we continually feed it with our energies, intellect, and emotions.

The judge and both parties play a role in ending litigation. The law surrounding remittitur should reflect that. Under *Scioto*, defendants seek remittitur and benefit from it, but then can extend the litigation risk-free by appealing the remitted judgment. While remittitur is an effective tool at bringing about closure, it loses its vitality when it fails that important role. The plaintiff should not have to bear the brunt of its failure.

Thus, for reasons of fairness and judicial economy, we adopt what has become known as the "Wisconsin rule." Pursuant to the Wisconsin rule, first enunciated in *Plesko v. Milwaukee* (1963), 19 Wis.2d 210, 220-221, 120 N.W.2d 130, 135, a plaintiff who accepts a remittitur may appeal the trial court's determination of the damage issue if the opposing party appeals any issue. If the reviewing

court finds no error as to the determination of damages, the plaintiff's prior acceptance of judgment for the reduced amount will be affirmed unless the result of the principal appeal requires otherwise.

The court's reasoning in *Plesko* mirrors our own concerns about fairness and judicial economy. The court wrote:

"The objective underlying the recommended procedure for granting an option to accept judgment for a reduced amount of damages in lieu of having a new trial, where the damages awarded by the jury are determined by the trial court to be excessive, is to avoid the delay and expense of an appeal or a new trial. In most situations, it is likely that the party will accept judgment for such reduced damages rather than undergo the expense, delay and uncertainty of result of an appeal or new trial. Nevertheless, if a party found liable to pay damages appeals the judgment resulting from the other party's accepting such reduced damages, this objective has been negatived. When plaintiff is forced to undergo an appeal by the action of an opposing party, after plaintiff has accepted judgment for such reduced damages, it seems unfair to prevent his having a review of the trial court's determination leading to the reduction in damages, especially if the plaintiff has accepted same only to avoid the delay and expense attending an appeal. Furthermore, the new rule herein announced may to some extent discourage appeals by the party held liable because of the possibility that the party who has accepted judgment for the reduced damages may prevail on his motion for review and have the jury's verdict reinstated." 19 Wis.2d at 221, 120 N.W.2d at 135.

Remittitur works best where no appeal follows. A plaintiff accepts remittitur in lieu of a new trial. An appeal reopens the possibility of new trial, leaving the plaintiff with a reduced award that she cannot appeal. Defendants, as in this case, are able to attack that jury award on appeal. The goal of judicial economy is thwarted, and a defendant receives an unfair advantage as to what is appealable.

We do not know whether the threat of appealability of the remittitur will persuade defendants not to appeal cases. However, if remittitur's benefit to judicial economy is thwarted by an appeal, the system operates more fairly under the Wisconsin rule.

We therefore reverse the court of appeals on this issue.

The Remittitur in this Case

A court has the inherent authority to remit an excessive award, assuming it is not tainted with passion or prejudice, to an amount supported by the weight of the evidence. In *Chester Park v. Schulte* (1929), 120 Ohio St. 273, 166 N.E. 186, paragraph three of the syllabus, this court set forth the specific criteria that must be met before a court may grant a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages.

The trial court in this case did state at one point in its opinion on remittitur that it was "not prepared to say that a verdict of $25,000,000 is excessive under Ohio law."

The trial court was obviously not concerned with "magic words." But the court throughout its opinion did keep in mind the twin goals of punitive damages – punishment and deterrence. The court found that the award as remitted will "sufficiently punish Conrail and create a positive inducement to change its practices." The court reduced the award to an amount sufficient to promptly effectuate the purpose of punitive damages. Damages allowed beyond that sufficiency would have been excessive.

We find that the trial court did not abuse its discretion in concluding that a $15 million punitive damages award was sufficient to achieve the purpose of punishment and deterrence.

Post-Judgment Interest Relief

The trial court granted Conrail relief from paying post-judgment interest on the punitive damages award. The court of appeals affirmed the trial court's decision. We find that the trial court's decision to relieve Conrail from paying interest on the punitive damages award was contrary to law.

R.C. 1343.03(B), Ohio's interest statute, provides in relevant part:

"[I]nterest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid."

The statute is direct and mandatory. The $15 million punitive damages award was a "judgment * * * for the payment of money rendered in a civil action based on tortious conduct." As such, the interest "shall be" computed from the date the judgment is rendered.

The statute provides no wiggle room, and renders pointless any discussion about the philosophical underpinnings of punitive damages. The statute applies to judgments. This was a judgment. The statute applies and the interest clock ran from the date of the judgment.

We therefore reverse the court of appeals on this issue.

Accordingly, the judgment of the court of appeals is affirmed in part and reversed in part.

Judgment affirmed in part and reversed in part.

DOUGLAS, RESNICK and FRANCIS E. SWEENEY, JJ., concur.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., concur in part and dissent in part.

MOYER, C.J., concurring in part and dissenting in part.

I concur with the judgment of the majority and with the reasoning in the majority opinion, except on the remittitur issue (Issue IV). I write separately because we are not required to reach the issue of whether a remittitur is generally appealable by the plaintiff. Therefore, this is an inappropriate case for defining a new standard of law for Ohio.

I would hold that where, as in the case before us, a trial court deems a jury award not to be excessive, the trial court lacks authority to offer a remittitur, and that it is an abuse of discretion to grant a new trial or offer a remittitur to reduce damages.

Because the trial court here expressly determined that the jury did not award excessive punitive damages under Ohio law in returning a verdict of $25,000,000, the trial court had no authority to remit the jury award to $15,000,000. It therefore becomes necessary to reevaluate the appropriateness of the punitive damages award.

The majority correctly states that, in lieu of ordering a new trial, a court has the inherent authority to remit an excessive award not tainted by passion or prejudice, if the plaintiff agrees to the remittitur. *See, e.g., Larrissey v. Norwalk Truck Lines, Inc.* (1951) 155 Ohio St. 207, 44 O.O. 238, 98 N.E.2d 419, paragraph five of the syllabus; *Pendleton Street R.R. Co. v. Rahmann* (1872), 22 Ohio St. 446.

However, "[i]t is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier of fact." *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40, 543 N.E.2d 464, 469. The trial court has only limited authority to offer remittitur. The concept of remittitur was developed to provide the trial court with an alternate remedy, in the interest of judicial economy, by which it could correct an award that was legally excessive, thereby avoiding another trial.

In *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, 166 N.E. 186, paragraph three of the syllabus, this court

set forth the specific criteria that control the determination of a trial court to grant remittitur. One of these criteria is that the original jury award is found to be excessive. The majority cites this criterion, admits that the trial court did not meet it, and yet, accepts the trial court's order of remittitur.

I have found no support for allowing a trial court to offer remittitur absent a finding that a jury's verdict of damages was excessive. To allow a court to offer remittitur simply because the trial court, as in this case, believes that a lesser award might help the defendant accept the verdict without challenge, would be to infringe improperly upon the plaintiff's right to a jury determination and could be viewed as encouraging defendants to threaten appeals and delay payment of verdicts.

The trial court, in this case, originally filed a judgment entry ordering the defendant to pay the plaintiff the entire $25,000,000 in punitive damages that had been awarded by the jury. Following this judgment entry, the defendant moved for remittitur to an amount less than $1,200,000 on the grounds that the verdict was excessive and in violation of due process, or in the alternative, for a new trial on the grounds that the verdict was tainted with passion and prejudice. The court granted the motion for remittitur and denied the motion for a new trial. In doing so, the trial court cited *Chester Park*, including the criterion that the trial court find the damages award to be excessive. The trial court then specifically found that the damages awarded by the jury were not excessive under Ohio law and unconditionally denied the motion for a new trial. It nonetheless asked the plaintiff to agree to a remittitur.

It is true that we must defer to the trial court's discretion, absent an abuse of discretion, when it determines a verdict to be legally excessive. See *Thompson v. Titus* (1959), 169 Ohio St. 203, 8 O.O.2d 166, 158 N.E.2d 357; *Larrissey* at 219-220, 44 O.O. at 243-244, 98 N.E.2d at 426. However, we cannot defer to a judgment that the trial court had no authority pursuant to statutory or common law to make.

I would remand this case to the court of appeals to determine whether the trial court erred in concluding that the punitive damages award was not excessive.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

COOK, J., concurring in part and dissenting in part.

I concur in the decision to affirm the judgment of the court of appeals on the issues raised by Conrail on cross-appeal.

I dissent, however, from the decision of the majority to depart from the precedent ratified just three years ago in *Scioto Mem. Hosp. Assn. v. Price Waterhouse* (1996), 74 Ohio St.3d 474, 479, 659 N.E.2d 1268, 1273, that binds a party to its acceptance of a remittitur. The majority decision to overrule this recent case rests on "[t]he different circumstances that this case presents," and to me that reasoning departs from the precept that a court's "judgment should be a declaration of legal principles rather than a determination of facts and circumstances." *Lamb v. Lehmann* (1924), 110 Ohio St. 59, 80, 143 N.E. 276, 282. Certainly a court should be vigilant in reviewing prior holdings for error and should retreat from erroneously

decided precedent when justified. But "different circumstances" is not a reason that comports with the goals of neutrality and predictability.

Because I would not overrule *Scioto*, I would affirm the court of appeals' decision that the remittitur is not appealable. I also would affirm the related determination of the court of appeals that because the remittitur judgment denied post-judgment interest, plaintiff may not appeal that aspect of the remittitur either.

LUNDBERG STRATTON, J., concurring in part and dissenting in part.

I concur with the majority on the third (Appealability of Remittitur by Plaintiffs) and fifth issues (Post-Judgment Interest Relief), but respectfully dissent on the first (Evidentiary Issues), second (Excessiveness of Punitive Damages Award), and fourth issues (The Remittitur in this Case).

Excessiveness of Punitive Damages

and

The Remittitur in this Case

I believe that the damages award in this case is, in essence, an award based on a wrongful death – the fact that Michelle Wightman was killed in this accident. Under Ohio law, punitive damages are not permitted in wrongful death cases. See *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 23, 8 O.O.3d 11, 13, 374 N.E.2d 411, 413; *Schaefer v. D & J Produce, Inc.* (1978), 62 Ohio App.2d 53, 57, 16 O.O.3d 108, 111, 403 N.E.2d 1015, 1018-1019. The majority avoids addressing this issue, carefully referring

only to the property damage of $2,400 as the point of comparison. Yet, the majority frequently refers to the "harm" created by the accident, such as referring to Conrail's actions as "a practice that could result in massive property damages, physical injuries, and untold psychological pain." By distinguishing this case from *BMW of N. Am. Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, on the basis of health and safety issues, the majority implicitly sanctions the punitive damages award for the wrongful death, *not* the comparatively minor property loss.

By affirming an award of punitive damages that is 6,250 times the property damage award (even after remittitur), this court may encourage plaintiffs in wrongful death cases to include a property damage claim, no matter its value, to use as a basis to recover exorbitant punitive damages. The result is, in essence, a judicially endorsed negation of Ohio's wrongful death statute. This court has now implicitly sanctioned punitive damages for wrongful death, despite the fact that a wrongful death claim exists only by statute and does not provide for punitive damages.

Since the majority does not directly address this issue, presumably, the principle of law still stands that punitive damages cannot be awarded in a wrongful death claim. To the extent that the majority intended otherwise, I dissent.

Evidentiary Issues

I believe that Conrail was wrongfully denied due process when it was not allowed to present a full defense

in the remand trial. The Ohio Constitution mandates that due process be afforded to all litigants. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean* (1914), 234 U.S. 385, 394, 34 S.Ct 779, 783, 58 L.Ed. 1363, 1369. See, also, *Matthews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18, 32 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' "); *Brock v. Roadway Express, Inc.* (1987), 481 U.S. 252, 261, 107 S.Ct. 1740, 1747, 95 L.Ed.2d 239, 250.

For over a century, the law in Ohio has been that when awarding punitive damages, a jury should consider *all* evidence, both aggravating and mitigating. *Schneider v. Hosier* (1871), 21 Ohio St. 98, 113-114. Due process and fundamental fairness require that the jury be informed of all of the circumstances in order to fully evaluate the defendant's conduct. Yet Conrail was prevented from presenting an effective defense because the trial judge in the retrial on the punitive damages issues excluded much of the testimony from the original trial. The second jury, in essence, heard only plaintiff's version of the events.

I agree that to some degree an award of punitive damages may have been proper in the case. The majority clearly set forth the shortcomings of Conrail in this matter. But Michelle Wightman was not without fault. There was testimony in the original case that had Wightman exercised caution, she could have avoided this accident. Yet this jury heard none of this evidence.

In fact, the original jury found that Wightman was forty percent responsible for the accident. *That* jury heard

evidence that Wightman was a young, inexperienced driver, having had her license for only six months. *That* jury heard how she had drunk two cans of beer and three wine coolers, supplied by her mother, before the accident. They also heard from another expert, Dr. Herbert Moskowitz, that this combination of factors increased Wightman's risk of accident by five hundred percent. *That* jury also had a vehicle dynamics event analysis from expert Deane H. Ellsworth that an unimpaired driver proceeding at her speed would have had time to see and avoid the oncoming train. The jury on remand was entitled to know that another jury had earlier found Wightman to be forty percent contributorily negligent.

We do not know if the jury on remand, had it heard all of this evidence on remand, would have awarded the same amount of punitive damages. But we do know that the first trial judge, who did hear this evidence, refused to award any punitive damages at all – a sharp contrast to the second verdict of $25 million. That alone creates a very strong presumption of prejudice. By hearing Dr. William Berg's testimony only and no contradicting opinion on whether the accident was avoidable, the jury had no opportunity to judge the credibility of that testimony. Only by hearing all of the testimony could the jury on remand have effectively evaluated (1) whether to award *any* punitive damages, and (2) if so, how reprehensible Conrail's conduct was in light of the evidence adduced at the original trial that Wightman *could* have avoided the accident. Evidence of Wightman's contributory negligence was not sufficient to excuse Conrail from compensatory liability, but it may well have been sufficient to excuse Conrail from a punitive damages award. This

grossly one-sided presentation denied Conrail any due process or fundamental fairness in this trial.

For the reasons above, I believe that the verdict was sorely tainted. I would reverse and remand on the evidentiary and excessiveness issues for a full and fair retrial.

Darlene M. Wightman Admx. of the Estate of Michelle L. Wightman, Deceased, et al., Appellees/Cross-Appellants v. Consolidated Rail Corporation, et al., Appellants/Cross-Appellees

Court of Appeals No. E-97-001
COURT OF APPEALS OF OHIO,
SIXTH APPELLATE DISTRICT, ERIE COUNTY

September 30, 1997, Decided

OPINION AND JUDGMENT ENTRY

SHERCK, J. This appeal and cross-appeal comes to us from an award of $15,000,000 in punitive damages against a railroad found culpable of "actual malice", following a train/automobile collision. Because we conclude that the trial court's evidentiary rulings were correct and the damages awarded not excessive, we affirm its decision. We similarly affirm the trial court on the issues raised by appellees/cross-appellants.

Shortly before midnight on February 18, 1989, a westbound freight train (designated SEEL 7) owned by appellant/cross-appellee ("appellant") Consolidated Rail Corporation, lost pressure in its air brakes near Remington Avenue, Sandusky, Ohio. This equipment failure caused the train to stop approximately two hundred feet east of the Remington Avenue road crossing. The presence of the train so near the crossing triggered the warning lights and gates at the crossing.

SEEL 7 was manned by a three-man crew – an engineer, conductor and brakeman. The engineer remained in the locomotive cab and communicated the train's problem by radio to a Toledo dispatcher. The conductor and

brakeman began to "walk" the mile-long train for the purpose of finding and repairing the air leak. In the meantime, traffic on Remington Avenue began to maneuver around the gates and over the two sets of tracks. Shortly before midnight, a Sandusky police officer came upon the scene. The officer requested his dispatcher to advise the railroad of the situation. He also issued warnings to two or three drivers he observed go around the gates. The officer then left the scene to stop another motorist.

At 12:05 a.m., sixteen-year-old Michelle Wightman, driving her mother's 1985 Ford, came upon the crossing and attempted to maneuver around the gate and cross the tracks. As she inched across the tracks, Michelle's car was struck by an eastbound fast freight train on the parallel track. Michelle and her passenger, sixteen-year-old Karrie Wieber, were killed.

Appellee/cross-appellant ("appellee"), Darlene M. Wightman, Michelle's mother, instituted a suit on behalf of herself and as the administrator of Michelle's estate. The suit contained two causes of action: a wrongful death claim and appellee's personal property claim arising from the destruction of her car. Both claims were premised on appellant's negligence which appellee alleged constituted intentional, wanton and reckless misconduct. The suit sought compensatory and punitive damages.

In October 1990, the matter proceeded to jury trial. At trial, appellee's presentation focused on the factors contributing to the collision. Railroad safety expert Dr. William Berg testified that the cause of the accident was the combination of restricted visibility (due to SEEL 7's

close proximity to the crossing) and the loss of "credibility" (due to the inordinately long activation of the railroad gates and flashing lights without the arrival of a train). Appellee argued that the railroad had near certain knowledge that under these circumstances someone would cross the tracks. At the same time, railroad employees knew that a fast freight was coming on the obscured track. With this knowledge, appellee contended, the railroad could have instituted any number of simple, cost free measures which would have prevented the collision and the resulting death of two people. According to appellee, the railroad's failure to take any measure to prevent the collision constituted actual malice – a conscious disregard for the safety of persons in circumstances in which a great probability of substantial harm existed. Appellant took the position that Michelle Wightman was herself negligent per se for violating a state law prohibiting crossing railroad tracks when warning signals are activated.

The jury returned a verdict for the plaintiff. In response to a series of interrogatories, the jury set damages on the wrongful death claim at $1,000,000, apportioned comparative negligence at sixty percent for appellant and forty percent for Michelle Wightman, but concluded that appellant was guilty of actual malice which was a proximate cause of the collision. The jury also found that appellant should be liable for punitive damages.

Following the verdict, the trial court, in conformity with former R.C. 2315.21(C)(2), began bench proceedings on the punitive damages issue. However, in mid-November 1990, appellant filed an affidavit of prejudice against

the trial judge which it followed with several motions seeking to set aside the verdict. The Supreme Court of Ohio rejected appellant's attempt to disqualify the trial judge. Nonetheless, it was not until late summer 1991 that the damages hearing was completed. More motions followed. Finally, the trial court rejected appellant's further attempts to set aside the jury's decision and, on February 11, 1992, entered judgment on the verdict. The court awarded the compensatory damages, but refused to grant any punitive damages. The court did not rule on appellee's motion for post-verdict interest on the compensatory damages or her motion for attorney fees.

Pursuant to a trial court's certification that there was no just reason for delay, the February 11 judgment was appealed to us. We affirmed the jury's verdict, but on appellee's cross-appeal concluded that the trial court erred when it failed to award any punitive damages. We rejected on cross-appeal appellee's constitutional challenge to that portion of R.C. 2315.21, which reserved to the trial judge the consideration of the amount of punitive damages. The matter was then remanded to the trial court for consideration of punitive damages. *Wightman v. Consolidated Rail Corp.* (1994), 94 Ohio App. 3d 389, 640 N.E.2d 1160.

After remand, the Supreme Court declared R.C. 2315.21(C)(2), which reserved consideration of punitive damages to the trial judge, unconstitutional. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, syllabus. The result of that decision sets the unique procedural posture for the present appeal.

The combination of the Supreme Court's nullification of R.C. 2315.21(C)(2) and our remand to the trial court to set punitive damages meant the original jury would need to be reassembled or a new jury empaneled to determine the amount of punitive damages. Because of the extended period between the original trial and the remand, the second option was chosen.

Prior to trial, the court granted appellee's motions *in limine* barring reference to the prior trial judge's refusal to award punitive damages, the award of compensatory damages in the first trial, application of a federal railway administrative rule enacted after the accident and evidence of Michelle Wightman's alcohol consumption or allegations that appellee furnished alcoholic beverages to her daughter. The trial court also granted appellant's motion to exclude any reference to the fact that a portion of the award might go to a charitable foundation.[1] The court also limited discussion of other railroad crossing accidents unless such were "substantially similar" to the one at issue.

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[1] In the period between the remand and the punitive damages trial, the estate pledged a portion of any punitive damages received to appellee/cross-appellant Michelle Wightman Charitable Foundation. The foundation was permitted to join the proceeding as a party but the trial court granted a motion in limine denying any mention to the jury of the foundation or any assignment of proceeds. The foundation is an appellee/cross-appellant in this appeal. For purposes of this appeal we shall reserve the appellation "appellee" to Darlene Wightman unless making specific reference to the foundation.

The matter was then retried before a second jury. Testimony at the second trial, to a great extent, mirrored that in the first. Dr. Berg again testified that the position of SEEL 7 near the crossing blocked the line of sight for any motorist looking for westbound trains and triggered traffic control devices which became ineffective as time passed. Berg testified that of the thousands of railroad crossing accidents which he had studied, a large number occurred in circumstances substantially similar to these. He also testified that it would have been relatively simple and cost free for the railroad to remedy this dangerous situation. According to Berg, the railroad could have insisted that the train crew flag the crossing, slowed the fast moving freight, or moved the engine of the stopped train across the crossing when it was known a fast freight train was due.

On submission, the jury returned a verdict awarding appellee $25,000,000 in punitive damages. Subsequent to the verdict, the trial court granted appellant a remittitur. Although specifically refusing to find the $25,000,000 award excessive, the court reduced the amount to $15,000,000; appellee accepted this reduction. The trial court also denied appellee's motion for attorney fees and post verdict interest on the compensatory damages award; the court further granted appellant relief from interest on the punitive award.

Appellant now brings this appeal setting forth the following three assignments of error:

> "I. The trial court violated Conrail's Due Process rights by prohibiting Conrail from introducing its evidence regarding the circumstances

of the accident and allowing only plaintiff to introduce such evidence.

"II. The trial court erred in admitting plaintiff's expert testimony because the expert did not base his opinions on personal knowledge or on the evidence admitted at trial and did not disclose the facts that supported his opinions, in violation of Rules 703 and 705 of the Ohio Rules of Evidence.

"III. The trial court violated Conrail's rights under Ohio common law and the Due Process Clause of the United States Constitution by refusing to overturn or further remit the punitive damages award because that award, even after remittitur, is grossly excessive in light of Conrail's conduct and is 6,250 times greater than the compensatory damages award."

Appellee Darlene Wightman cross-appeals raising the following four assignments of error:

"I. THE TRIAL COURT ERRED BY NOT MAKING ITS REMITTITUR EXPRESSLY CONDITIONAL ON ACCEPTANCE BY BOTH PARTIES AS AUTHORIZED BY THE SO-CALLED 'WISCONSIN RULE,' WHICH THIS COURT FOR THE PUBLIC GOOD SHOULD ADOPT AS THE LAW OF OHIO.

"II. THE TRIAL COURT ERRED BY GRANTING CONRAIL'S REQUEST FOR RELIEF FROM INTEREST ON THE PUNITIVE AWARD.

"III. IT WAS ERROR FOR THE TRIAL COURT TO DENY INTEREST ON THE COMPENSATORY AWARD TO THE WIGHTMAN

ESTATE, COMPUTED FROM THE DATE OF THE LIABILITY VERDICT.

"IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR ATTORNEY FEES."

Appellee Michelle Wightman Charitable Foundation has filed a brief in support of Darlene Wightman's appeal and an independent cross-appeal in which it raises the following single assignment of error:

"The Trial Court erred by remitting the jury's punitive damage award because the Trial Court specifically found that the jury award was not excessive."

I.

In its first assignment of error, appellant maintains that the trial court's decision to bar reference to certain matters rendered it defenseless. The court granted plaintiff's motion *in limine* to block reference to the fact that the first trial had resulted in a wrongful death award, but no punitive damages. The court also prevented the introduction of evidence that appellee's decedent had consumed a small quantity of alcohol prior to the collision and expert testimony concerning the effects such alcohol might have had on a driver.

Relevant evidence is generally admissible, irrelevant evidence is not. Evid.R. 402. Relevant evidence is defined as that evidence having a tendency to make the determination of a fact of consequence more or less probable than it would be without the evidence. Evid.R. 401. Even evidence which is relevant is inadmissible if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of the issues or misleading the jury. Evid.R. 403(A). The decision of whether or not to admit evidence rests in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248. An "abuse of discretion" is more than an error of law or of judgment, the term connotes an attitude that is unreasonable, arbitrary or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 168-169, 559 N.E.2d 1301.

When we initially reviewed this case, we affirmed the first jury's verdict in its entirety, including its conclusion that appellant's disregard for the safety of others constituted "actual malice." *Wightman v. Consolidated Rail Corp.* (1994), at 408. We also noted that a finding of actual malice negates any role that comparative or contributory negligence plays in reducing or defeating the recovery of damages. *Id.* at 407. The only issue to be decided on remand was the amount of punitive damages to which appellee would be entitled. *Id.* at 409. Consequently, the amount of compensatory damages awarded in the first trial and the fact that the first trial judge failed to award punitive damages were absolutely irrelevant to any issue of consequence in the punitive damages trial.

The presence of a small quantity of alcohol in the teenage driver's blood may have had some probative value in a comparative or contributory negligence setting. However, those issues were settled in the first trial. Even assuming blood alcohol evidence was in any way relevant to the punitive damages issue, it was certainly not an abuse of discretion for the trial court to exclude such testimony pursuant to Evid.R. 403(A).

Accordingly, appellant's first assignment of error is found not well-taken.

II.

In its second assignment of error, appellant contends that the trial court erred in admitting the testimony of plaintiffs' expert, Dr. Berg. Specifically, appellant objects to Berg's statement that of the approximately one thousand vehicle-train collisions annually, a large number occurred in situations substantially similar to this one.

Again, decisions as to the admission of or exclusion of evidence are within the sound discretion of the court. Appellant's position is that Evid.R. 703 and Evid.R. 705 prohibit any expert opinion unless based on the expert's own specific observations or evidence admitted at trial. This position is specious in two respects. First, Dr. Berg's credentials reveal that he has a Ph.D. in civil engineering and has spent decades studying, among other things, rail crossing collisions. In addition, Berg testified that he personally investigated numerous vehicle-train collisions. If appellant needed more specifics than this, it was free to inquire on cross-examination. Second, Evid.R. 703 prohibits expert testimony based on unadmitted hearsay or unobserved data only with respect to the specific issues in the case at bar. According to Professor Giannelli,

> "In one sense, * * * most expert witness testimony is based, in part, on hearsay. The extrajudicial statements of colleagues, textwriters, and teachers are all used by experts in forming opinions. *See* 2 Wigmore. *Evidence* § 665b (Chadbourn rev 1979). Rule 703 does not prohibit this use of hearsay information. This

> use of texts and lectures contributes to the expert's qualifications. Rule 703 is concerned only with the 'facts and data in the particular case.' Those facts must be admitted in evidence. According to the court in *Bluebird Baking Co. v. McCarthy*, 3 Ohio Op. 490, 19 Ohio L. Abs. 466, 470, 36 N.E.2d 801 (App, Franklin 1935), an expert's qualifications and knowledge 'may be based on personal experience or upon reading from standard works. It generally is based upon both. * * * " Giannelli, Ohio Evidence Manual (1991), § 703.05 at 117.

For Dr. Berg to testify to the specific reasons Michelle Wightman's car was struck by a train, the circumstances surrounding that collision must be admitted into evidence. However, for Dr. Berg to testify to a broad general pattern of collisions, many of which were substantially similar to the Wightman crash, no such foundation is required. Again, if appellant was not pleased with the expert's testimony it was free to cross-examine or present contrary opinion from its own experts. Accordingly, appellant's second assignment of error is found not well-taken.

III.

Appellant's remaining assignment of error concerns the amount of punitive damages awarded which appellant characterizes as being "grossly excessive." Noting that a wrongful death cannot form the basis for punitive damages, *see, Rubeck v. Huffman* (1978), 54 Ohio St. 2d 20, 374 N.E.2d 411, appellant argues that the only foundation

for the $15,000,000 award was the $2,400 value of appellee's car. This, appellant computes, is a ratio of six thousand two hundred fifty to one, substantially greater than the average ratio of punitives to damages in Ohio cases and even greater than the five hundred to one ratio found constitutionally offensive in *BMW of North America, Inc. v. Gore* (1996), 571 U.S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589.

The trial court's detailed and perceptive analysis of this issue is contained in its order of December 5, 1996, in which it granted appellee's motion for remittitur. (Attached as Appendix A.) Although we reserve discussion of the trial court's ultimate decision to grant the remittitur until our consideration of appellee's cross-appeal, we otherwise approve and adopt the decision of the trial court (pages 8 through 19) on this issue as our own.

Accordingly, appellant's third assignment of error is not well-taken.

IV.

Appellee Darlene Wightman's first cross-assignment of error and appellee Wightman Foundation's sole assignment of error contest the trial court's grant of appellant's motion for remittitur, contending it could not have properly granted such a motion absent a finding that the award was excessive. Both of these parties agreed to accept the remittitur. It has long been held that a judgment based on an agreement of the parties renders immaterial erroneous rulings of the court. *Jackson v. Jackson* (1865), 16 Ohio St. 163; *Sanitary Commercial Services, Inc. v.*

Shank (1991), 57 Ohio St. 3d 178, 181, 566 N.E.2d 1215. More specifically, Ohio common law provides that a party who accepts a remittitur cannot change the remittitur even if the opposing party institutes an appeal. *See Scioto Memorial Hosp. Assoc. v. Price Waterhouse* (1996), 74 Ohio St. 3d 474, 478, 659 N.E.2d 1268, *Iron Railroad Co. v. Mowery* (1881), 36 Ohio St. 418, paragraph three of the syllabus.

Nevertheless, appellee urges us to adopt the "Wisconsin rule" which states that a defendant, who benefits from a remittitur and appeals, faces the risk of having the original verdict reinstated. *Plesko v. Milwaukee* (1963), 19 Wis. 2d 210, 220-221, 120 N.W.2d 130. While we may concur with appellee's reasoning on this issue, we are bound to follow the rule of law set down by the Supreme Court of Ohio. *Kruse v. State* (1972), 31 Ohio St. 2d 132, 148, 285 N.E.2d 736, Corrigan, J. concurring, overruled on other grounds (1981), 67 Ohio St. 2d 31, 426 N.E.2d 784. Therefore, appellee's arguments are best directed to that court. Accordingly, appellee Wightman's first cross-assignment of error and appellee Wightman Foundation sole assignment of error are not well-taken.

V.

Appellee Darlene Wightman's remaining assignments of error concern the trial court's refusal to grant post-judgment interest on the punitive damage award, impose prejudgment interest on the wrongful death award for the nearly two year period between the verdict and the judgment on the verdict, and grant appellee reasonable attorney fees.

With respect to the denial of post-judgment interest on the punitive damages, the trial court's decision on this issue came as part of the calculations it employed in determining the remittitur. As discussed above, appellee accepted this remittitur and cannot now be heard to complain of its terms. Accordingly, appellee Darlene Wightman's second cross-assignment of error is found not well-taken.

In her third cross-assignment of error, appellee Darlene Wightman seeks to meld common law prejudgment interest with the statute allowing for prejudgment interest when there is bad faith. As noted in *Moskovitz v. Mt. Sinai Md. Ctr.* (1994), 69 Ohio St. 3d 638, 656-657, 635 N.E.2d 331, at common law the factfinder was permitted to include in its tort award an amount sufficient to compensate a victim for interest on damages actually sustained in order to make the plaintiff whole. *Id.* citing *Hogg v. Zanesville Canal & Mfg. Co.* (1832), 5 Ohio 410, 424. Moreover,

> " ' * * * if reparation for the injury is delayed for a long time by the wrong-doer, the injured party can not be made whole unless the damages awarded include compensation, in the nature of interest, for withholding the reparation which ought to have been promptly made.' " *Id.* quoting *Lawrence Railroad Co. v. Cobb* (1878), 35 Ohio St. 94, 98-99.

Statutory prejudgment interest is authorized by R.C. 1343.03(C) which permits interest to be awarded from the date a cause of action accrued if, following a post-verdict hearing, the court determines that a party against whom a verdict is returned failed to make a good faith effort to

settle the case. The determination of whether there was a lack of good faith by a party is vested in the sound discretion of the court. *Moskovitz* at 658.

The question of whether common law prejudgment interest should be awarded appears to be an issue for submission to and resolution by the finder of fact. *See Moskovitz* at 656-657 and cases cited therein. No request for such a submission to either Wightman jury was made; therefore, no such consideration was undertaken. Appellee is consequently precluded from common law prejudgment interest.

Assuming for the sake of argument that the phrase " * * * good faith effort to settle the case * * * " used in R.C. 1343.03(C) may be construed to apply to dilatory tactics employed by a party between a verdict and the issuance of a judgment, this does not alter the fact that the trial court refused to find bad faith. Viewing the totality of the circumstances, we cannot at this stage conclude that the trial court's determination was an abuse of discretion.

Concerning attorney fees, this again is an issue which rests in the sound discretion of the court. *Digital and Analog Corp. v. Norton Supply Co.* (1992), 63 Ohio St.3d 657, 664, 590 N.E.2d 737.

> "Although the general rule is that reasonable attorney fees may be awarded in an action where punitive damages have also been awarded, a trial court may decline to award any amount of attorney fees if the defendant upon whom such fees will be imposed successfully rebuts the presumption that reasonable fees should be awarded. Thus, a trial court may consider whether the punitive damages awarded are adequate both to compensate the plaintiff for his attorney fees and

> to fulfill the punitive and deterrent purpose of the exemplary damages awarded. If the court concludes that the punitive damages are sufficient to fulfill those purposes without the imposition of attorney fees, the court may decline to award such fees, even if a jury has determined that such fees should be awarded." *Id.* at 664-665 (Citations omitted.)

A determination by the trial court that a $15,000,000 punitive award provided a sufficient punitive and deterrent purpose would be within the court's discretion.

Accordingly, appellee Darlene Wightman's third and fourth cross-assignments of error are found not well-taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant and appellee share equally the court costs of this appeal.[2]

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See*, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

Peter M. Handwork, J.

George M. Glasser, J.

James R. Sherck, J.

CONCUR.

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[2] The parties have file numerous motions following oral argument, all of which are, hereby, overruled.

DARLENE M. WIGHTMAN, Admx. of the Estate of Michelle L. Wightman, Deceased, et al., Plaintiffs, -vs- CONSOLIDATED RAIL CORPORATION, et al., Defendants.

CASE NO. 89-CV-416

STATE OF OHIO, COURT OF COMMON PLEAS, ERIE COUNTY

December 5, 1996, Filed

ORDER

On May 23, 1996, a jury returned a verdict in favor of the plaintiff, Darlene M. Wightman, against defendant, Consolidated Rail Corporation ("Conrail"), in the amount of $25,002,400.[1] On May 24, 1996, the Court entered judgment for that amount "with interest and costs taxed against the defendant."

Defendant moves for remittitur "in an amount less than (sic) $1,200,000.00" on the grounds that the verdict is excessive and in violation of due process under the criteria announced in *BMW v. Gore*, 517 U.S. ___, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). In the alternative, defendant seeks a new trial on the grounds that the verdict is tainted with passion or prejudice and, additionally, that it was denied a fair trial due to evidentiary errors. Defendant also asks the Court to amend the judgment entry to "delete the provision for interest on the basis that the award violates the Excessive Fines Clauses of the United States Constitution and the Ohio Constitution."

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[1] The parties stipulated that Darlene Wightman had suffered $2,400 in property damage.

The Court has reviewed the extensive written submissions of both parties and has carefully considered the oral arguments of counsel presented on July 18, 1996. For the reasons that follow, the Court grants defendant's motion for remittitur; denies defendant's motion for a new trial; and grants defendant's motion to amend the judgment of May 24, 1996 to delete the provision requiring defendant to pay interest on the judgment.

On the evening of February 18, 1989, a Conrail train, SEEL-7, came to a stop near Remington Avenue in the City of Sandusky, Ohio, because of a broken air hose. Before stopping, the train activated the gates and lights at the crossing. Shortly after midnight, while SEEL-7 remained standing approximately 200 feet from the crossing, another westbound train, TV9, traveling approximately 60 mph on the adjacent mainline track, struck a passenger car owned by Darlene Wightman and operated by her teen-age daughter, Michelle Wightman. Michelle and her friend, Karrie Wieber, were killed instantly in the crash. Witnesses estimate that SEEL-7 was stopped between 40 minutes to an hour prior to the collision.

Darlene Wightman, as Administratrix of her daughter's estate and individually as the owner of the car, sued Conrail for compensatory and punitive damages. On October 30, 1990, a jury found Conrail to be 60% at fault and awarded compensatory damages to the Estate of Michelle Wightman in the amount of $1,000,000. The jury also returned the following verdicts in response to interrogatories:

Interrogatory No. 7

Do you find by clear and convincing evidence, that defendant, Conrail, authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrated 'malice', and, if so, that such malice was, by clear and convincing evidence a proximate cause of the accident?

Answer: Yes

Interrogatory No. 8

Do you find, by clear and convincing evidence, that defendant, Conrail, should be liable for punitive damages?

Answer: Yes

At the time of the trial in 1990, *Ohio Rev. Code Ann.* § 2315.21 (Page's 1995) provided that juries were to decide the right to punitive damages and that the amount of punitive damages was to be determined by the Court in a separate hearing. The punitive damages hearing to the Court in this case was held on August 9, 1991.

Both parties filed numerous post-trial motions. On November 10, 1992, the trial court entered judgment in favor of the Estate of Michelle Wightman for $1,000,000 on the basis of *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St. 3d 520, 575 N.E.2d 453. The Court awarded no punitive damages and did not rule on plaintiffs' motions for attorneys fees and prejudgment interest. Conrail appealed the compensatory award to the Wightman estate and the Wightmans cross-appealed the trial court's failure to award punitive damages, attorneys fees and pre-judgment interest.

The Court of Appeals affirmed the compensatory award, reversed the trial court's failure to award punitive damages, and remanded the case "to the trial court for determination as to the amount of punitive damages to which appellee, Darlene Wightman, is entitled in accordance with this opinion. . . . " The Court also remanded the matter to the trial court for rulings on plaintiffs' motions for attorneys fees and pre-judgment interest. *Wightman* at 409.

On September 14, 1994, the Supreme Court of Ohio declined jurisdiction to hear the case.

While the unresolved issues were pending in this Court, the Supreme Court of Ohio held that *Ohio Rev. Code Ann.* § 2315.21 (C)(2) violates the right to trial by jury under Section V, Article I of the Ohio Constitution. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, 644 N.E.2d 397. Based on *Zoppo*, plaintiffs requested the Court to set the matter for jury trial on the issue of punitive damages only.

On October 31, 1995, the Court ruled that the plaintiffs were not entitled to attorneys fees or pre-judgment interest.

Before addressing defendant's arguments in support of remittitur, a brief review of Ohio law governing this process is in order.

I. THE LAW GOVERNING REMITTITUR

Although Civil Rule 59 does not explicitly authorize courts to remit part of a damage award, remittitur has long been recognized in Ohio jurisprudence and derives

from the fact that the authority to order a new trial in the interest of justice is within the court's inherent power. *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, 278, 285, 166 N. E. 186; *Redman v. Price Bros. Co.*, 27 Ohio N.P. (N.S.) 287. The principles governing remittitur were first clarified by the Ohio Supreme Court in *Chester Park, supra* as follows:

> The subject of reduction of verdicts and judgments in actions for liquidated damages is coming before courts of review with ever-increasing frequency. It is therefore time, and high time, that this court should lay down some principles and declare some policies for future guidance . . . :
>
> 1. In an action for unliquidated damages, neither the trial court nor any reviewing court has the power to reduce the verdict of a jury or to render judgment for a lesser amount without the consent to such reduction of the party in whose favor the verdict was rendered.
>
> 2. If a trial court in an action for unliquidated damages finds that the verdict is excessive, and that it was rendered under the influence of passion or prejudice, it has no alternative except to set it aside and grant a new trial.
>
> 3. If a verdict in an action for unliquidated damages is in the opinion of the trial court excessive, *but not appearing to be influenced by passion or prejudice,* the court may with the assent of the plaintiff reduce the verdict by remittitur to any amount supported by the evidence. . . .

Id. at 289-90 (Emphasis added).

Under *Chester Park*, a trial court, when presented with a motion to remit, must consider: (1) whether the jury's award was tainted with passion or prejudice, and (2) whether the verdict, as it stands or as reduced by remittitur, is supported by the evidence. Using this framework, the Court will first consider whether this jury's verdict was tainted with passion or prejudice.

II. CRITERIA GOVERNING THE DETERMINATION OF "PASSION OR PREJUDICE"

Where a trial court determines that a jury verdict is the product of passion or prejudice, the verdict is null and void and the Court is required to order a new trial. 90 Ohio Jur. 3d, Trial, § 643. This is true whether the award is excessive or inadequate. Although some authorities hold that the size of a verdict may furnish a "suspicion" of passion or prejudice, size alone is not conclusive proof of passion or prejudice. *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 9 S. Ct. 458, 32 L. Ed. 854; *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, 189 N.E. 851; *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App. 2d 239, 246 N.E.2d 602; *Gates v. Strong* (1966), 14 Ohio App. 2d 121, 237 N.E.2d 161. Only where the size of the verdict has been held to be so out of proportion to the damage done as to "shock all sense of proportion" or "shock all reasonable sensibilities," have courts found that the size of the verdict justifies setting it aside. *Spicer v. Armco Steel Corp.* (1974), 68 Ohio Op. 2d 314, 322 N.E.2d 279; *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (Ohio Com. Pl. 1985).

Defendant argues that the size of the jury's award suggests that it "was influenced by the fact that Conrail is a very large, out of state corporation" and by the fact that plaintiffs' counsel argued that the jury should consider Conrail's financial resources in determining the damages to be assessed. The Court finds this argument to be without merit.

As noted by the Court of Appeals, one of the factors to be properly considered in determining the amount of punitive damages under Ohio law is the financial condition of the defendant. *Wightman* at 408. Since the manifest purpose in allowing a jury to consider defendant's financial worth is to assist the jury in determining the amount necessary to punish and deter the offending conduct, there is nothing improper, *per se*, in suggesting that a jury should consider a defendant's financial condition in determining the amount of money necessary to effectuate the purposes of this remedy. The Court, therefore, finds that the argument of plaintiffs' counsel in this case was proper and that the jury's verdict was not the result of passion or prejudice engendered either by the evidence of defendant's financial condition or by the manner in which plaintiffs' counsel incorporated evidence of defendant's financial condition into his final argument. Accordingly, defendant's motion for a new trial on this ground is denied.

Having decided that the punitive damage verdict is not the product of passion or prejudice, the Court must now turn to the second issue required by *Chester Park*, namely, whether the damages awarded are excessive in the opinion of the trial court.

III. STANDARDS FOR DETERMINING EXCESSIVENESS

Defendant contends that the punitive award is "grossly excessive" and asks this Court to remit the verdict to an amount less than $1,200,000. Defendant argues that, since the actual damages here are $2,400 and since the Court in *Gore* found a ratio of punitive to actual damages of 500 to 1 to be excessive, this Court should "order a remittitur to an amount under $1,200,000 million, consistent with the decision in *Gore*." This contention will be considered, firstly, under the standards for excessiveness embodied in Ohio law governing punitive damages. Thereafter, the Court will consider whether the verdict is excessive in light of the United States Supreme Court's constitutional analysis in *Gore*.

a. Excessiveness under Ohio law

Where a trial court determines that the size of a verdict is not warranted by the evidence, it may, with the consent of the plaintiff, reduce the verdict to an amount justified by the evidence. *Larrissey v. Norwalk Truck Lines* (1951), 155 Ohio St. 207, 219; 98 N.E.2d 419, 426; *Shoemaker v. Crawford* (1991), 78 Ohio App. 3d 53, 65, 603 N.E.2d 1114. There is no simple mathematical formula to be applied in determining when remittitur is proper. The court's essential role is to determine whether a verdict is supported by the weight of the evidence.

In deciding whether a verdict is supported by the evidence, trial courts are given substantial deference and wide latitude. Unlike the standard for determining

whether or not to direct a verdict, trial courts are permitted in this context to assess the credibility of witnesses and to weigh the evidence. In performing this function, however, trial courts do not evaluate testimony and evidence as if they are sitting as a trier-of-fact. Rather, a trial court must ascertain whether the verdict, as rendered, is contrary to the "manifest weight of the evidence" resulting in "manifest injustice." *Rohde v. Farmer* (1970), 23 Ohio St. 2d 82, 92-93, 262 N.E.2d 685.

In discussing the factors to be considered in assessing punitive damages, the Court of Appeals stated in *Wightman* at 409 as follows:

> Although the General Assembly has not set forth the factors to be considered, our review of cases dealing with awards of punitive damages compels us to conclude that the amount of the actual damages sustained should not be the sole factor in determining the appropriate award of punitive damages. Rather, a number of factors must be considered by a trial court in making its determination, while keeping in mind that the purpose behind an award of punitive damages is punishment of the guilty party and the deterrence of similar conduct in the future. See, generally, *Villella v. Waiken Motors, Inc.* (1989) 45 Ohio St. 3d 36, 543 N.E.2d 464; *Calmes v. Goodyear Tire & Rubber Co.*, (1991), 61 Ohio St. 3d 470, 473, 575 N.E.2d 416, 419. These factors would necessarily include, but are not limited to, the nature of the conduct that resulted in the injury, the financial condition of the defendant, the amount necessary to deter future similar conduct, and prior or similar acts by the defendant, as well as the amount of actual or compensatory damages. *Villella, supra; Spadafore v Blue Shield*

(1985), 21 Ohio App. 3d 201, 21 Ohio B. Rep. 215, 486 N.E.2d 1201; *Estate of Morad v. Task* (Mar. 10, 1994), 1994 Ohio App. LEXIS 921, Cuyahoga App. No. 64787, unreported, 1994 WL 78157.

Defendant's motion requires this Court to apply these criteria to the testimony and evidence before the Court.

At the outset, this Court feels compelled to say that the record before it clearly justifies an award of substantial punitive damages. As far as the nature of Conrail's conduct is concerned, this case may be without precedent. When the SEEL-7 train came to a stop about 200 feet from the Remington crossing, the crew members recognized immediately that a dangerous condition existed. They knew that other westbound trains traveling at speeds up to 70 mph were due at the crossing. They could see that the stopped train, standing on the northernmost mainline track, severely obstructed the ability of southbound motorists to observe the presence of a westbound train. They knew that the lights would continue to flash and the gate arms would remain down so long as their train remained stopped near the crossing. They also knew that, because their train had activated the signal system as it "was approaching Remington Avenue, there was no way another train could cause the red lights to begin flashing and the gate arms to come down so as to advise motorists of an approaching train in hazardous proximity to the crossing. They knew that, if they left the train to find and repair the problem which had brought SEEL-7 to a stop, their train might remain stopped for an hour or longer before the problem could be corrected.

The SEEL-7 crew also knew from experience that, under these conditions, most motorists will proceed over the crossing. According to one witness with 43 years of railroad experience, 99% of all drivers are likely to proceed over the crossing in circumstances where the gate arms have been activated for an unusual period of time. The evidence showed that the conditions at Remington Avenue created special dangers for motorists because of the physical characteristics of the crossing.

Remington Avenue is a relatively narrow two-lane street, with a sharp grade up to the tracks. On the northern approach to the tracks, there is a steep embankment immediately at the edge of the pavement. This makes it difficult, even dangerous, for motorists to turn their vehicles around once they reach close proximity to the crossing. In this instance, it was Saturday night and the traffic was heavy. Consequently, any motorist who actually stopped short of the gates would complicate the driving task of other motorists trying to proceed southwardly on Remington Avenue. These conditions were plainly visible to SEEL-7's crew.

The evidence established that the position of SEEL-7 to the east of the crossing made it impossible for a driver of a southbound car to observe the headlights of a westbound train on the adjacent track until the southbound car was already at a point where it would probably be struck by a fast moving train. It was entirely foreseeable, therefore, that a motorist might get in a position where there was not sufficient time to react and avoid a collision once the approaching train became visible. This extremely dangerous situation was recognized immediately by Sandusky Police officer, Lonnie Newell, who

happened on the scene about 20 minutes prior to the collision. Officer Newell immediately reported the danger he observed to his dispatcher and, a few minutes later, the dispatcher notified Newell that Conrail had been advised of the danger at the crossing. After receiving this notification, Officer Newell left the crossing. Conrail introduced no evidence showing that it did anything in response to the notification of danger by the Sandusky Police Department. About 15 minutes later the Wightman car was struck by a westbound train.

There was extensive testimony regarding measures which Conrail could have used to guard against a catastrophic collision while gate arms are down while an obstructing train remains stopped near a crossing. A flagman can be sent to the crossing to stop traffic when a train is approaching. One or more of the engines of the stopped train can be detached from the remainder of the train and moved forward to block the crossing while another train is approaching. Because there was continuing radio communications between Conrail's dispatcher at Toledo and other trains, SEEL-7 could have notified the dispatcher about the conditions at the crossing and the dispatcher could have radioed approaching trains to slow down their speed to accommodate existing conditions. None of these measures was taken. Instead, a 60 mph train, TV9, was allowed to approach the crossing without any slackening of its speed and a collision occurred which took the lives of two teen-age girls.

The record shows that SEEL-7's conductor and head brakeman, after recognizing and acknowledging the danger at the crossing, left the head end of the train to find the problem which had caused SEEL-7 to come to a stop.

Conrail argued in the second trial on punitive damages in 1996 that, in doing so, its crew was not following the rules and, therefore, it did not actually ratify the acts of its employees. This contention, firstly, ignores the finding of the first jury in 1990 that "Conrail authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrated 'malice' . . . (and) . . . that defendant, Conrail, should be liable for punitive damages . . . . "

Secondly, Conrail's position regarding ratification ignores the fact that the decision of the original jury was appealed and the Court of Appeals, after carefully considering Conrail's argument that there was insufficient evidence to justify an award of punitive damages, stated as follows:

> This court has thoroughly reviewed the arguments of the parties concerning the jury charge, the entire transcript of the proceedings before the trial court and the applicable law . . . . Upon consideration of the entire record of proceedings in the trial court, we find that there was clear and convincing evidence to support the jury's finding of actual malice on the part of appellant *CRC*. 94 Ohio App. 3d at 400, 408.

Conrail's contention, therefore, that there was no ratification essentially constitutes an attempt to repudiate the earlier decisions of the jury and the appellate court.

Thirdly, the testimony of Conrail's own employees does not support its argument. According to the conductor of SEEL-7, Conrail's rules required him and the head brakeman to find and correct the problem rather than be

concerned about having a flagman at the crossing. In the 1996 trial, the conductor testified as follows:

> Q: So you then felt that under your training and the rules, you were supposed to go back and find and fix the leak, rather than go up and protect the crossing?
>
> A: That was our only option.

Furthermore, according to Mr. Kevin Dailey, who is the manager of Conrail's operating rules for the Dearborn division, Conrail's operating rules dealing with the situation which existed at Remington have not changed since the date of the collision. Dailey testified as follows:

> Q: So what you're really saying then, that in this precise situation as far as your operating rules on Conrail are concerned the rules were the same in 1989 as they are today?
>
> A: That's correct.

This Court finds it troubling that Conrail, in the 1996 trial, essentially asked the jury to disregard the findings of the earlier jury and the decision of the Court of Appeals. This reflects a corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced this catastrophic collision needs to be changed. This Court is of the opinion, therefore, that an award of substantial punitive damages is both warranted by the evidence and necessary to accomplish the fundamental purpose of punitive damages, namely, to deter future similar conduct. On the basis of this record, therefore, the Court is not prepared to say that a verdict of $25,000,000 is excessive under Ohio law. This Court, however, does not believe that its responsibilities end there.

The Court is concerned that if it simply overrules Conrail's motion lengthy appeals will ensue with potentially grave consequences for the safety of motorists using Conrail grade crossings. The Court, therefore, feels compelled, as a matter of public safety, to do everything in its power to insure that the purpose of punitive damages is promptly effectuated and that Conrail promptly changes the practice which produced this unnecessary tragedy. After much reflection, the Court has concluded that the most effective way to deter Conrail from continuing this practice is to remit the jury's verdict to an amount which will sufficiently punish Conrail and create a positive inducement to change its practices, rather than continue to challenge the findings of the earlier jury and the Court of Appeals. The Court is prepared, therefore, to enter an order denying Conrail's motion for a new trial on the condition that plaintiffs consent in writing within ten days of this order to a remittitur in the amount of $10,000,000.

b. Excessiveness under the Due Process Clause

Having determined that a remittitur of $10,000,000 is appropriate, the Court will now consider whether the verdict, as remitted, violates due process under the principles announced by the United States Supreme Court in *BMW v. Gore*. The first step in this constitutional analysis is to identify the state interests that a punitive award is designed to serve.[2]

---

[2] Darlene Wightman has assigned a substantial part of her punitive award to a charitable foundation which, on motion,

(i) The state's interest in punishing the conduct

States are accorded substantial flexibility in establishing the amount of punitive damages necessary to vindicate a state's interest in punishing misconduct and deterring its repetition. Nonetheless, an award of punitive damages violates due process when it is "grossly excessive" in relation to that interest. In the instant case, the specific state interest advanced by the award of punitive damages is the protection of public safety at railroad grade crossings. This is a legitimate state goal and is different both in kind and degree from the economic interests at stake in *Gore*.

The prevention of unnecessary deaths at railroad grade crossings is clearly a state interest of supreme importance. This Court, therefore, concludes that an award of $15,000,000 in punitive damages under the facts of this case supports and promotes the state's legitimate interest in punishing and deterring behavior that creates a grave danger to public safety. Having identified this interest, the Court must now consider whether the size of the punitive award is "grossly excessive" according to the three guideposts prescribed by the Supreme Court.

(ii) The reprehensibility of the conduct.

The first and most important of the three Gore criteria is the degree of reprehensibility of the defendant's conduct. It has long been accepted that the gravity of the

---

was permitted to intervene as a party in interest, but not to participate in the punitive damages trial.

offense and the aggravating factors associated with the conduct may properly be considered in determining the size of a punitive award. Critical to the Gore court's finding of unconstitutional excessiveness was the fact that "none of the aggravating factors associated with particularly reprehensible conduct is present." The Court noted, for example, that the BMW's conduct "evinced no disregard for the health and safety of others." *Gore* at 4340.

By contrast with the defendant's conduct in *Gore*, Conrail's conduct here evinces a conscious disregard for public safety. The evidence supports the conclusion that Conrail's failure to take corrective action at railroad grade crossings, when the warning devices are inoperative or ineffectual, creates the likelihood of sudden, violent injury or death to passing motorists. Moreover, the evidence shows that it is a long-standing Conrail practice.

Additionally, there was no evidence that BMW persisted in its conduct after a court had adjudged that conduct unlawful. By comparison, the jury here could have concluded that Conrail has not substantially altered its operating rules and procedures since the *Wightman* collision.

On these facts, therefore, a punitive award of $15,000,000 is supported by the reprehensibility of Conrail's wrongful conduct alone.

(iii) The ratio of the punitive award to the actual injury.

The second guidepost considered in *BMW v. Gore* is "whether there is a reasonable relationship between the

punitive damages award *and the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *Gore* at 4341, quoting *Pacific Mutual Life Ins. v. Haslip*, 499 U.S. 1, 21, 113 L. Ed. 2d 1, 111 S. Ct. 1032 (1991). (Emphasis in original.) The Court makes it clear that the proper analysis is to compare the size of the award with the potential harm, not just the actual harm. Where, as in the present case, the potential for grave harm is great, "even low compensatory damages may support a higher ratio than high compensatory damages." *Gore* at 4342.

As noted earlier, the differences between the potential for harm in *Gore* and the potential for harm associated with Conrail's conduct represents a difference in kind, not just in degree. In *Gore*, the harm engendered by the conduct was self-contained and apparent at the time the conduct was executed; that is to say, the injury resulting from the wrongful repainting of automobiles is limited to the decrease in economic value. As the Supreme Court observed, "there is no suggestion that *Gore* or any other BMW purchaser was threatened with additional potential harm." *Gore* at 4342. In contrast, Conrail's long-standing operating practice made it highly probable that serious injury or death would occur and cause substantial harm.

Gore also rejects the notion "that the constitutional line is marked by a simple mathematical formula, even one that compares actual and *potential* damages to the punitive award." *Gore* at 4342, citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 448, 125 L. Ed. 2d 366, 113 S. Ct. 2 711 (1993). (Emphasis in original.) Conrail's argument fails to recognize that *Gore* itself

emphatically rejected the use of such a calculation, particularly when the wrongful conduct consciously disregards public safety. It follows, therefore, that the Court must reject Conrail's suggestion that the Court apply a simple mathematical formula to determine whether the verdict in *Wightman* is unconstitutionally excessive.

(iv) Sanctions for comparable misconduct.

The final indicium of excessiveness described in *Gore* is whether there is a wide disparity between the punitive award and the civil and criminal sanctions the state imposes on similar misconduct. If such a disparity exists, a defendant would not be given fair notice of the potential punishment associated with the particular act of misconduct and thus the punitive award could be unconstitutionally excessive. The Court, however, finds no such infirmity here.

Since it is apparent that the conduct at issue – the failure to provide motorists with adequate warning of approaching trains at multiple track crossings when gates are down for an abnormal length of time while motorists' ability to see approaching trains is obscured – could have generated a civil damage award of several million dollars. This might have been the outcome, for example, had Michelle Wightman and Karrie Wieber, instead of being instantly killed, been severely injured in the collision. Therefore, this award does not violate this *Gore* criterion.

Furthermore, this Court believes that had the appropriate prosecuting authorities been made aware of all the facts and circumstances surrounding this tragic and unnecessary collision, those authorities would have been

compelled to consider criminal prosecution, possibly for involuntary manslaughter.

Finally, as noted by the Supreme Court in *Gore*, even in cases where there is a disparity between punishments for comparable conduct, a higher punitive award is justified where the defendant has a history of noncompliance, since experience has proved that the lower amount is ineffectual as a deterrent. In this case, the plaintiff submitted sufficient credible evidence to show that the defendant's operating procedures had been in place for years prior to the Wightman collision, despite the fact that Conrail has known for many years that these procedures create great danger that a catastrophic train/car collision will occur.

The Court, therefore, concludes that a verdict of $15,000,000 is not grossly excessive in light of the due process analysis set forth in *Gore*.

IV. WHETHER THE DEFENDANT WAS DENIED A FAIR TRIAL DUE TO THE COURT'S EVIDENTIARY RULINGS

The defendant further contends that it was denied a fair trial due to the Court's rulings on evidentiary matters and that it is, therefore, entitled to a new trial pursuant to Civil Rule 59(A)(A). Specifically, the defendant argues that the Court erred in granting plaintiff's motion *in limine* to exclude evidence of negligence and/or recklessness by Michelle Wightman or Darlene Wightman. This contention overlooks the fact that the sole issue for jury determination under the Court of Appeals' remand order was the amount of punitive damages to be assessed

against Conrail. Since all issues other than the amount of punitive damages were fully adjudicated in the first trial and affirmed by the Court of Appeals, the Court properly granted plaintiffs' motion *in limine*.

Defendant also claims that the Court improperly permitted plaintiffs' expert, Dr. Berg, to testify that there had been a large number of accidents involving drivers who were struck by trains after going around gates that were activated by standing trains. Defendant argues that Dr. Berg's testimony did not specifically identify how many of these other accidents involved Conrail trains. This testimony, however, had probative value because it supports plaintiffs' contention that it has been known in the railroad industry for many years that the combination of conditions which existed at Remington Avenue is likely to produce train/car collisions. This testimony, therefore, was relevant to the jury's determination of the amount of punitive damages because it showed that Conrail had notice of the danger to motorists caused by the operational practice in question.

Accordingly, the defendant's motion for a new trial based on the Court's evidentiary rulings is denied.

V. WHETHER THE AWARD OF INTEREST VIOLATES THE EXCESSIVE FINES CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS

Defendant moves the Court "to modify the judgment and delete the provision for interest on the basis that the award violates the Excessive Fines Clauses of the United States and the Ohio Constitutions." Conrail argues that "the government of Ohio has taken a positive step of

punishment against Conrail in this case through the Court's order of interest on the punitive award pursuant to R.C. § 1343.03"; and that this "imposes an excessive penalty on Conrail in contravention of its rights under the Excessive Fines Clause." The Court finds no conclusive authority in support of Conrail's request. However, it has been held that interest on a penalty is disfavored. *See* 60 Ohio Jur.3d, Interest and Usury § 14. Because punitive damages are, by definition, awarded over and above the amount necessary to adequately compensate a plaintiff, interest on that amount to compensate for delay in payment may be unnecessary. *Cf. Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St. 3d 36, 543 N. E. 2d 464. Accordingly, the judgment of May 24, 1996 is amended to delete the words "with interest . . . taxed against the defendant."

For the reasons stated, the Court grants defendant's motion for remittitur on the condition that plaintiffs consent in writing to entry of final judgment in the amount of $15,000,000 within ten (10) days of this entry. The Court denies defendant's motion for a new trial. The Court grants defendant's motion to modify the judgment of May 24, 1996 to delete the provision for the running of interest.

IT IS ORDERED, ADJUDGED AND DECREED.

JUDGE JOSEPH CIRIGLIANO

IN THE COMMON PLEAS COURT OF
ERIE COUNTY, OHIO

Darlene M. Wightman, Admx. of the Estate of Michelle L. Wightman, deceased, et al.	)	Case No. 89-CV-416
Plaintiffs	)	JUDGMENT ENTRY
vs	)	
Consolidated Rail Corporation, et al.,	)	(Filed Oct. 31, 1995)
Defendants.	)	

Defendant Conrail's Motion To Dismiss is denied. The FRA regulations upon which the defendant bases its express and implied preemption claim were enacted six (6) years after the accident here and do not expressly or by force of decision apply retroactively. Defendant's claim that it acted in accordance with the FRA regulations and therefore lawfully is not supported by the record.

Plaintiffs Motions In Limine are sustained. The Court of Appeals has stated that the jury's finding of malice has removed negligence from the case.

Defendant's Motion In Limine to limit a reference to the wrongful death of Michelle Wightman is sustained. The punitive damages sought here relate solely to plaintiff's property damage claim.

Defendant's Motion In Limine barring plaintiff from mentioning any collisions not substantially similar to the collision in this case is sustained; the Court reserves the right to determine the similarity of the Stetz and Brown cases at trial.

Plaintiff's Motion for Attorney Fees is denied. *Sharp v. Norfolk & Western Ry. Co.* (1995) 72 Ohio St. 3d 307.

Defendant's Motion To Dismiss plaintiff's claim for interest is sustained. There is no authority for such an award.

It is so ordered.

/s/ Richard B. McQuade, Jr.
Richard B. McQuade, Jr.
Judge by Assignment

IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO

Darlene M. Wightman, Admx. of the Estate of Michelle L. Wightman, Deceased, et al.,	*	Case No. 89-CV-416
Plaintiffs,	*	JUDGMENT ENTRY
-vs-		
Consolidated Rail Corporation, et al.,	*	(Filed November 10, 1992)
Defendants.	*	

* * *

Upon consideration of all briefs, memoranda, arguments of counsel, the jury's general verdict, answers to interrogatories, and relevant case law, including *Schellhouse v. Norfolk & Western Ry. Co.* (1991), 61 Ohio St. 3d 520, the Court orders the following:

1) Defendants' motion for new trial is denied;

2) Judgment is rendered in favor of the Estate of Michelle L. Wightman, Deceased, in the amount of the jury's verdict, One Million Dollars ($1,000,000) compensatory damages;

3) No punitive damages are awarded.

There is no just cause for delay.

/s/ Ann B. Maschari
Ann B. Maschari, Judge

IN THE SUPREME COURT OF OHIO

DARLENE M. WIGHTMAN, Admx. of the Estate of Michelle L. Wightman, Deceased, *et al.*,	:	CASE NO. 97-2342
Appellants/ Cross-Appellees,	:	ON APPEAL FROM THE ERIE COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT
v.	:	
CONSOLIDATED RAIL CORPORATION,	:	
Appellee/ Cross-Appellant.	:	

MOTION OF APPELLEE/CROSS-APPELLANT, CONSOLIDATED RAIL CORPORATION TO RECUSE JUSTICE FRANCIS E. SWEENEY AND JUSTICE PAUL E. PFEIFER (FILED UNDER SEAL)

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Now comes Appellee/Cross-Appellant, Consolidated Rail Corporation ("Conrail"), and moves for the recusal of Justice Francis E. Sweeney and Justice Paul E. Pfeifer pursuant to Canon 3(G)(1) of the Ohio Code of Judicial Conduct. Conrail submits this motion on the ground that campaign contributions given to these Justices by appellant/cross-appellee Darlene M. Wightman's counsel, Murray & Murray Co., L.P.A., and individual members of that firm and their spouses while this appeal was pending were of a level and character as to create an appearance of partiality and impropriety on the part of these Justices.

The timing of this post-argument motion is a consequence of the campaign financial report filing schedule from the 1998 election, under which the final reports by the campaign committees of Justice Sweeney and Justice

Pfeifer were filed on December 11, 1998 and were made publicly available on December 15, 1998.

In support of this motion, Conrail submits the attached memorandum with separate Appendix.

Respectfully submitted,

/s/ Arlin M. Adams

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IN THE SUPREME COURT OF OHIO

DARLENE M. WIGHTMAN, Admx. of the Estate of Michelle L. Wightman, Deceased, *et al.*,	:	CASE NO. 97-2342
Appellants/ Cross-Appellees,	:	ON APPEAL FROM THE ERIE COUNTY COURT OF APPEALS, SIXTH APPELLATE DISTRICT
v.	:	
CONSOLIDATED RAIL CORPORATION,	:	
Appellee/ Cross-Appellant.	:	

MEMORANDUM IN SUPPORT OF MOTION OF APPELLEE/CROSS-APPELLANT, CONSOLIDATED RAIL CORPORATION TO RECUSE JUSTICE FRANCIS E. SWEENEY AND JUSTICE PAUL E. PFEIFER (FILED UNDER SEAL)

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BACKGROUND

The case underlying the present motion to recuse involves a collision between a car owned by Darlene Wightman and driven by her sixteen-year old daughter Michelle Wightman, and a train operated by Consolidated Rail Corporation ("Conrail"). On the evening of February 18, 1989, the Conrail train lost pressure in its brake system, causing it to stop approximately 208 feet east of a grade crossing in Sandusky, Ohio, and activating the gates and flashing lights at the crossing. Michelle Wightman approached the crossing, driving her mother's car, and drove around the gates and across the tracks. Before she cleared the crossing, another Conrail train, which was proceeding on an adjacent track with its whistle blowing and its headlights on, struck the Wightman automobile. Michelle Wightman and her passenger died instantly and the car was destroyed.

Darlene Wightman commenced a lawsuit against Conrail, asserting two claims: a wrongful death claim seeking compensatory damages, and a property damage claim seeking compensatory and punitive damages for the $2,400 in damage to her car. Extensive proceedings in Ohio's trial and appellate courts ensued, including three trials (one jury trial on compensatory damages, one bench trial on punitive damages, and one jury trial on punitive damages).[1] The result of these proceedings was

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[1] The procedural history of this case is set forth in detail in the Amended Combined Merit Brief of Consolidated Rail Corporation in Response to Merit Brief of Appellants/Cross-Appellees and in Support of the Cross-Appeal, filed in the Ohio Supreme Court on May 22, 1998.

that, on the wrongful death claim, the first jury found both Michelle Wightman and Conrail negligent, apportioning 60% of the negligence to Conrail and 40% to Michelle Wightman and awarding $1,000,000 in compensatory damages. The judge in the first punitive damages trial determined that no punitive damages should be awarded.

In the second punitive damages trial, a second jury awarded Darlene Wightman $25,000,000 in punitive damages on her $2,400 property damage claim. The trial court entered a remittitur on the punitive damages award to $15,000,000 and denied post-judgment interest on the punitive damages award. Darlene Wightman consented to the remittitur. On cross-appeals, the Court of Appeals for the Sixth Appellate District affirmed in all respects.

The parties cross-appealed to the Ohio Supreme Court. By Order dated February 18, 1998, the Court accepted jurisdiction of both appeals. Oral argument before the Ohio Supreme Court took place on November 10, 1998. Justice Francis E. Sweeney and Justice Paul E. Pfeifer participated in the oral argument.

STATEMENT OF RELEVANT FACTS

Throughout this case, Darlene Wightman has been represented on a contingent fee basis by the law firm of Murray & Murray Co., L.P.A. (the "Murray law firm") in Sandusky, Ohio. The Murray law firm was founded by two brothers, Emmett Murray and Thomas J. Murray, who are both now deceased.

Emmett Murray had three sons: Jerry, Dennis, and Michael. Dennis and Michael are currently members of the Murray law firm.[2] Dennis, in turn, has three children: Dennis, Charles, and Margaret. Each of these children is currently a member of the Murray law firm. Thomas J. Murray had four sons: John, James, Thomas, and Patrick. Each of these sons is currently a member of the Murray law firm.

In sum, the Murray law firm currently includes nine members of the Murray family. They are: (1) Dennis E. Murray, Sr., (2) Michael T. Murray, (3) Dennis E. Murray, Jr., (4) Charles M. Murray, (5) Margaret Mary Murray, (6) John T. Murray, (7) James T. Murray, (8) Thomas J. Murray, and (9) Patrick Murray. See, Martindale-Hubbell Law Directory (1998).

As set forth in the final Ohio Campaign Finance Reports for the 1998 judicial campaign, filed on December 11, 1998 and made publicly available on December 15, 1998, the Murray law firm, together with the Murray family members of the firm and the spouses of most of them, made substantial financial contributions to the 1998 reelection campaigns of the Honorable Paul E. Pfeifer and the Honorable Francis E. Sweeney, both of whom participated in the oral argument in this appeal – an appeal with more than $25,000,000 at stake.

With respect to Justice Pfeifer's 1998 campaign, the Murray law firm contributed $5,000, and the Murray family members listed above (and, in most cases, their

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[2] To the best of our knowledge, Jerry Murray is no longer affiliated with the Murray law firm.

spouses) each contributed between $1,000 and $2,000. See, Ohio Campaign Finance Reports of Paul E. Pfeifer (relevant portions included as Exh. A in the separately-bound appendix hereto).[3] The total contribution to Justice Pfeifer's 1998 campaign made by the Murray family and the Murray law firm was $25,000. That figure is one of the largest contributions to Justice Pfeifer's campaign, and represents 4.4% of the total monetary contributions (of $573,486) to Justice Pfeifer's campaign. (For the Court's convenience, a chart detailing Conrail's understanding of the Murray family relationships and the Murray family 1998 contributions to the Justice Pfeifer campaign is attached to this memorandum).

For Justice Sweeney's 1998 campaign, the Murray law firm contributed $5,000, and the Murray family members listed above (and, in most cases, their spouses) each contributed between $1,000 and $1,900. See, Ohio Campaign Finance Reports of Francis E. Sweeney (relevant portions included as Exh. C in the separately-bound appendix hereto).[4] The total contribution to Justice Sweeney's 1998 campaign made by the Murray family and Murray law firm was $25,000. That figure is one of the largest campaign contributions to Justice Sweeney's campaign, and represents 4.7% of the total monetary

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[3] A copy of the complete Ohio Campaign Finance Reports of Paul E. Pfeifer is appended as Exhibit B in the separately-bound appendix hereto.

[4] A copy of the complete Ohio Campaign Finance Reports of Francis E. Sweeney is appended as Exhibit D in the separately-bound appendix hereto.

contributions (of $531,355) to Justice Sweeney's campaign. (For the Court's convenience, a chart detailing Conrail's understanding of the Murray family relationships and the Murray family 1998 contributions to the Justice Sweeney campaign is attached to this memorandum).

Equally significant are the following observations taken from the Ohio Campaign Finance Reports. First, each of the contributions from the Murray family and law firm for Justice Sweeney's campaign were made on the same date, February 9, 1998. Similarly, the contributions to Justice Pfeifer's campaign each were made within three days, from January 19 through January 21, 1998. Second, for both campaigns, whenever a contribution was made in the name of a Murray wife, the contribution was made on the exact same date as that of her husband. Third, for both campaigns, the address of the Murray law firm was given for three of the contributions made in a wife's name – Louise Murray, Shirley Murray, and Martha Murray (and, in addition, for Justice Sweeney's campaign, Michelle Murray also gave the Murray law firm address). To Conrail's knowledge, none of these individuals has a position at the law firm.

Briefly, then, while on an individual basis, the Murray family and law firm may have complied in letter with Ohio's campaign contribution limitations, in reality the Murray family and law firm contributed $25,000 to each campaign. Moreover, because this matter was undertaken under a 33$^{1}/_{3}$% contingency fee arrangement (see Contract between Darlene M. Wightman and Murray & Murray Co., L.P.A., included as Exhibit E in the separately-bound appendix hereto), the Murray law firm and each

Murray family member who made campaign contributions to Justice Pfeifer and Justice Sweeney have a direct, significant financial stake in the outcome of this appeal.

This motion requests the Court to decide whether the contributions by the Murray family and firm create the appearance of partiality and thereby require the recusal[5] of Justice Pfeifer and Justice Sweeney from further participation in this appeal.

ARGUMENT

THE CONTRIBUTIONS MADE BY THE MURRAY FAMILY AND LAW FIRM TO THE JUSTICE SWEENEY AND JUSTICE PFEIFER ELECTION CAMPAIGNS DURING THE PENDENCY OF THIS APPEAL CREATE THE APPEARANCE OF PARTIALITY AND REQUIRE RECUSAL.

Canon 7 of the Ohio Code of Judicial Conduct limits contributions to an Ohio Supreme Court Justice's campaign to $2,000 per individual and $5,000 per law firm. The $25,000 aggregate contribution of the Murray family and firm to each of Justice Sweeney's and Justice Pfeifer's campaign distorts the delicate balance Canon 7 seeks to achieve – particularly in a significant appeal such as this where the contributing firm and its members have a substantial financial stake in the disposition of the appeal. What is in effect a $25,000 contribution from a single firm breaks down any safeguards for judicial impartiality and creates an appearance of impropriety.

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[5] For purposes of this motion, we use the term "recusal" synonymously with the term "disqualification."

The law is clear: recusal is required where a judge's impartiality might be reasonably questioned, thereby creating an appearance of impropriety. As set forth below, under the exceptional circumstances presented here, the impartiality of Justice Sweeney and Justice Pfeifer is reasonably questioned and, therefore, they should be recused.

I. The Ohio Code Of Judicial Conduct Limits Campaign Contributions In Order To Maintain Judicial Impartiality And Prevent An Appearance Of Impropriety.

Article IV of the Ohio Constitution provides that members of the judicial branch of government shall be elected by popular vote of the citizens of Ohio. Ohio Const. IV, § 6; see, *In re Disqualification of Ney* (1995), 74 Ohio St. 3d 1271, 1272, 657 N.E.2d 1367, 1367. Canon 7(C) of the Ohio Code of Judicial Conduct, in turn, regulates the amounts and sources of funds that a judicial candidate may receive and spend during a campaign.[6]

Specifically, Canon 7(C)(5)(a) provides, in relevant part, as follows:

> [T]he campaign committee of a judicial candidate shall not directly or indirectly solicit or receive in the fund raising period allowed by

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[6] Canon 7(C)(2)(a) provides that judicial candidates "personally shall not solicit or receive campaign funds," but may "establish a committee to secure and manage the expenditure of funds for his or her campaign and to obtain statements of support for his or her candidacy."

division (C)(4) of this canon a campaign contribution aggregating more than the following:

> (i) From an individual other than the judicial candidate or a member of his or her immediate family, two thousand dollars in the case of a judicial candidate for chief justice or justice of the Supreme Court, five hundred dollars in the case of a judicial candidate for the court of appeals, or two hundred fifty dollars in the case of a judicial candidate for the court of common pleas, municipal court, or county court.
>
> (ii) From any organization,[7] five thousand dollars in the case of a judicial candidate for chief justice or justice of the Supreme Court or two thousand five hundred dollars in the case of all other judicial candidates.

Ohio Code of Judicial Conduct, Canon 7(C)(5)(a)(i)-(ii) (footnote added and not in original).

Canon 7 – with its limitation on campaign contributions, prohibition on a judicial candidate's direct solicitation of contributions, and establishment of campaign committees – is designed to safeguard judicial impartiality. These mechanisms are intended to act as a buffer between the contributor and the judicial candidate, insulating the candidate from the appearance of partiality toward those persons who financially support him or her. See, *Ney*, 74 Ohio St. 3d at 1272, 657 N.E.2d at 1367 ("Canon 7 . . . shields judicial candidates from many of the dangers of political activity and the direct solicitation

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[7] Canon 7(A)(7) defines the term "organization" as including a law firm.

of contributions by restricting the political and fund-raising activity of judges and judicial candidates."); Ohio Supreme Ct. Bd. of Comm'rs on Grievances and Discipline, Op. No. 92-9 (Apr. 10, 1992) ("A campaign committee is an important buffer between political necessity and judicial impartiality."); see also, *MacKenzie v. Super Kids Bargain Store, Inc.* (Fla. 1990), 565 So. 2d 1332, 1336 ("The statutory limitation upon contributions does . . . reduce the possibility of a *quid pro quo* arrangement between the candidate and the contributor and also acts to eliminate any appearance of impropriety."). See generally, Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors* (1988), 40 Stan. L. Rev. 449, 489.[8]

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[8] Two committees in Ohio have recommended that the Ohio Judicial Code of Conduct be amended to require disqualification of a judge who has received significant campaign contributions from a litigant or attorney before him or her. In August 1993, the Ad Hoc Committee to Review Ohio Supreme Court Campaign Finances recommended the following to the Board of Governors of the Ohio State Bar Association:

> We recommend that Canon 3(C)(1) "Disqualifications" of the Code of Judicial Conduct should be expanded to include a recusal rule that relates to the limitations on campaign contributions. Accordingly, we recommend that the following Paragraph (e) be added to Canon 3(C)(1):
>
> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:. . . .
>
> (e) The judge has a bias or prejudice by reason of contributions to the judge's campaign committee by a person, organization or political action committee having an interest in the outcome of the proceeding.

Implicit in the Canon is that contributions over the specified limit are improper and thereby create an appearance of impropriety. Cf. *Ex parte Thomas E. Bryant* (Ala. Crim. App.), 675 So. 2d 552, 554 (interpreting relevant sections of the Alabama Code to mean that a "campaign contribution to a circuit judge in excess of $2,000 will presumptively bias a circuit judge in the mind of the public"), *mandamus granted* (Ala. 1996), 682 So. 2d 39.[9]

Mem. from Ad Hoc Committee to Review Supreme Court Campaign Finances, at 3 (Aug. 23, 1993) (internal quotations omitted) (included as Exh. F in the separately-bound appendix hereto).

Soon thereafter, Chief Justice Moyer established the Citizens' Committee on Judicial Elections to review Ohio's judicial election system. The Committee's report, issued in 1995, indicated that nine out of ten Ohioans believe judicial decisions are influenced by contributions to political campaigns. Report of the Citizens' Committee on Judicial Elections, at 1, 8 (Jan. 1995) (included as Exh. G in the separately-bound appendix hereto). The report made a number of recommendations to increase the public's trust of the judiciary, including that contributions be limited to $1,000 for an individual and $2,500 for an organization (to be adjusted for inflation) in campaigns for a Supreme Court justice. *Id.* at 10. In addition, the Committee recommended that a judge or justice be prohibited from presiding in any proceeding where "an attorney or individual party . . . made a significant campaign contribution" and where "an attorney who is affiliated with a firm or organization . . . has made a significant contribution to the judge's campaign." *Id.* at 9.

After the report was submitted, the Ohio Supreme Court adopted the recommendations for contribution and expenditure limitations, revising Canon 7 of the Ohio Code of Judicial Conduct. However, the Court did not adopt the recommendations regarding disqualification.

[9] The Supreme Court of Alabama in *Ex parte Thomas E. Bryant* granted a writ of mandamus ordering that the criminal

Thus, where, as here, a law firm that has a direct, significant financial interest in a pending appeal in effect contributes $25,000 to a judge or justice's judicial campaign, the delicate balance sought to be achieved by the Canon between the reality of a judicial campaign and the need for an impartial judiciary is seriously diluted or destroyed as a matter of law. As set forth below, recusal is required in the situation presented here.

II. Recusal Is Required Where A Judge's Impartiality Might Reasonably Be Questioned And Where An Appearance Of Impropriety Is Created.

The starting point for determining whether a judge or justice should be recused from a judicial proceeding is the Ohio Code of Judicial Conduct. Canon 4(A) of the Code mandates that a judge avoid impropriety and the appearance of impropriety in all activities. That Canon provides as follows:

> A judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others and shall

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defendant, who was accused of enormous thefts from conservatorships and estates over which he was appointed by Mobile County judges, be tried before a circuit court judge outside of Mobile County. The Court held that "reasonable persons would have reason to question the impartiality of the judges of the 13th Judicial Circuit," where the defendant served as president of the county bar association and was a contributor to a large number of Mobile County judicial election campaigns. *Bryant*, 682 So. 2d at 41-42.

> not convey or permit others to convey the impression that they are in a special position to influence the judge. . . .

Ohio Code of Judicial Conduct, Canon 4(A).

Canon 3(G)(1) of the Code governs disqualification of Ohio Supreme Court Justices.[10] According to this Canon, a Justice must:

> disqualify himself or herself in a proceeding in which the justice's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the justice has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
>
> (c)(i) For merit cases, the justice knows that, individually or as a fiduciary, the justice or the justice's spouse or minor child residing in the justice's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. . . .
>
> (d) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . .

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[10] Canon 3 of the Code contains two sections on disqualification: Canon 3(E) relates to disqualification of judges of lower state courts and Canon 3(G) relates to disqualification of Justices of the Ohio Supreme Court. The differences in these two sections are minimal.

> (iii) is known by the justice to have an interest that could be substantially affected by the outcome of the proceeding.

Ohio Code of Judicial Conduct, Canon 3(G)(1)(a)-(d).

Significantly, the Commentary following Canon 3 emphasizes that the threshold determination for recusal is whether the "judge's impartiality might reasonably be questioned, regardless whether any of the specific rules . . . apply." This is consistent with the United States Supreme Court's recognition of the distinction between actual partiality and the appearance of partiality and with the requirement that all courts avoid even the appearance of partiality or impropriety. See, e.g., *Commonwealth Coatings Corp. v. Continental Cas. Co.* (1968), 393 U.S. 145, 150.

Moreover, the Commentary following Canon 5(C)(2)[11] of the American Bar Association ("ABA") Model

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[11] The ABA Model Code of Judicial Conduct, Canon 5(C)(2) provides:

> A candidate shall not personally solicit or accept campaign contributions or personally solicit publicly stated support. A candidate may, however, establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public

Code of Judicial Conduct makes clear the concern presented in extraordinary cases such as this.

> There is legitimate concern about a judge's impartiality when parties whose interests may come before a judge, or the lawyers who represent such parties, are known to have made contributions to the election campaigns of judicial candidates. . . . Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may, by virtue of their size or source, raise questions about a judge's impartiality and be cause for disqualification. . . .

ABA Model Code of Judicial Conduct, Canon 5(C)(2), commentary (1998).[12]

> support for the candidate's campaign no earlier than [one year] before an election and no later than [90] days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

[12] In fact, the ABA's Task Force on Lawyers' Political Contributions has recommended that Canon 5 be amended to include a new Canon 5(E). The proposed new Canon, which was presented as a resolution at the 1998 ABA Annual Meeting, would require elected judges to recuse themselves "if a party to the lawsuit or counsel for a party has made . . . a contribution in violation of the jurisdiction's applicable contribution limit." Report and Recommendations of the ABA Task Force on Lawyers' Political Contributions, Part Two, July 1998, at 34-35 (included as Exh. H in the separately-bound appendix hereto). The recommendation was presented to the ABA House of Delegates at the ABA 1998 Annual Meeting, which, in turn, referred it to the Ad Hoc Committee on Judicial Campaign Finance, where it is currently being considered.

The Ohio courts and disciplinary bodies also emphasize the importance of avoiding even the appearance of impropriety in order to preserve public confidence in the judicial system. This Court has articulated this standard as "whether the record supports a finding that [the judge's] impartiality has been put into question to the extent that his disqualification is necessary to avoid an appearance of prejudice or partiality and to ensure the public's confidence in the integrity of the judicial system." *In re Disqualification of Character* (1993), 74 Ohio St. 3d 1246, 1247, 657 N.E.2d 1351, 1351 (citing *In re Disqualification of Nugent* (1987), 47 Ohio St. 3d 601, 546 N.E.2d 927); see also, Ohio Supreme Ct. Bd. of Comm'rs on Grievances and Discipline, Op. No. 87-023, at 2 (June 22, 1987) ("Under the Code, a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . . The framers of the Code adopted this general policy for disqualification with the intention that any conduct that would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification.") (internal quotations omitted).

Recusal may be warranted even without proof of actual bias. See, Jay M. Zitter, Annotation, *Disqualification of Judge Because of Political Association or Relation to Attorney in Case* (1988), 65 A.L.R. 4th 73, 75-76. Moreover, while not requiring recusal on the particular facts presented, this Court on two occasions has stated that the ability of a judge to participate impartially and fairly must be decided on a "case-by-case" basis. *In re Disqualification of Ney* (1995), 74 Ohio St. 3d 1271, 1272, 657

N.E.2d 1367, 1367; *In re Disqualification of Celebrezze* (1991), 74 Ohio St. 3d 1231, 1232, 657 N.E.2d 1341, 1341.[13]

III. An Appearance Of Impropriety Is Created By The Murray Contributions To The Justice Sweeney And Justice Pfeifer Election Campaigns.

Under this precedent, the issue is not whether Justice Pfeifer or Justice Sweeney actually was (or will be) biased in his adjudication of the underlying case, but, rather, whether the on-looking world (and, more specifically, the citizens of the State of Ohio) reasonably would perceive the appearance of bias where one family unit with its family-run law firm contributed $25,000 to each Justice's ongoing reelection campaign only months before the same law firm argued a significant appeal before the Court (an appeal with over $25,000,000 at stake, one-third of it for the law firm). Under these unique circumstances, the answer is unequivocally yes.

More specifically, as delineated below, the size of the contributions (one of the largest contributions by a single law firm and family in the State of Ohio), the source of the contributions (all from the same family and its family-run law firm), and the timing of the contributions (during

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[13] *Ney* and *Celebrezze* are distinguishable in that they dealt with a litigant's and an attorney's service on a judge's campaign committee. The Ohio Supreme Court has not, until now, been presented with the unique circumstances that exist here – excessive contributions from the members of one family and its family-run law firm made contemporaneously with a pending appeal involving over $25,000,000, where the law firm entered into an agreement to receive one-third of the recovery.

the pendency of an appeal in which each of the family contributors has a direct, significant financial interest) reasonably raise questions about the appearance of impropriety.

It is undisputed that Justice Pfeifer and Justice Sweeney each received $25,000 in campaign contributions from the Murray law firm and family members. The size of these contributions – one of the largest contributions made to both campaigns, constituting 4.4% and 4.7% of the total amounts contributed to Justice Pfeifer and Justice Sweeney respectively – creates an appearance of impropriety and partiality.

The commentators are virtually uniform in recognizing that excessive contributions cause an appearance of impropriety and thereby mandate recusal. See, e.g., Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors* (1988), 40 Stan. L. Rev. 449, 489; Mark Andrew Grannis, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers* (1987), 86 Mich. L. Rev. 382, 405 ("Extremely large contributions will often constitute 'possible temptation' to depart from neutrality whether or not any of the other circumstances surrounding the contribution look suspicious.").

Many distinguished jurists also recognize that significant campaign contributions create an appearance of impropriety. As Washington Supreme Court Justice Robert Utter cogently has observed, "the mere appearance of a judge's ability to reward his supporters . . . and

discriminate against those who did not support him creates a situation which can only reduce public confidence in the judiciary." Robert F. Utter, *Selection and Retention – A Judge's Perspective* (1973), 48 Wash. L. Rev. 839, 843; see also, *In the Matter of Bradford Mason* (C.A. 7, 1990) 916 F.2d 384, 387-88 (case where "the attorney gave significant financial support to the judge's campaign committee while the judge was on the bench" would present a "difficult" disqualification issue because "[s]uch contributions create opportunities to curry favor, and large ones could require disqualification"); *O'Brien v. State Bar of Nevada* (Nev. 1998), 952 P.2d 952, 953, 956 (Rose and Young, JJ., dissenting) ("[W]hen the contribution is very large or greatly disproportionate to the contributions made by a similar class of contributors, then an appearance of impropriety should be recognized. . . . [T]here does come a point when the amount of money contributed creates an appearance of impropriety, especially when the judge is ruling or voting on an issue critical to the lawyer contributor . . . ."); *Aguilar v. Anderson* (Tex. App. 1993), 855 S.W.2d 799, 806 (Barajas, J., dissenting) (judge's soliciting and accepting a reelection campaign contribution of $300 from opposing counsel and his law firm creates reasonable questioning of judge's impartiality).

In *Keane v. Andrews* (Fla. 1991), 581 So. 2d 160, 160, Justice Ben Overton, in his dissenting opinion, declared that, "[c]ommon sense dictates the conclusion that [a] judge's impartiality may reasonably be questioned" where an opposing law firm contributed $3,850 to the judge's campaign, which constituted 17.5% of the judge's campaign contributions. As Justice Overton explained,

"[t]o allow a judge to preside under the circumstances in this case places the integrity of the judicial system in a subservient role to the political process." *Id.* See also, *MacKenzie v. Super Kids Bargain Store, Inc.* (Fla. 1990), 565 So. 2d 1332, 1337 n.4 ("There may very well come a point where a political contribution is substantial enough that it would create a well-founded fear of bias or prejudice.").

A twenty-five thousand dollar ($25,000) contribution to each Justice is an excessive amount by any standard. Moreover, it is a violation of Canon 7's implicit conclusion that campaign contributions must be kept to under $5,000 per firm and $2,000 per individual in order to maintain judicial impartiality and the appearance thereof.

An additional factor pointing toward an appearance of impropriety here is the source of the contributions. Campaign contributions were simultaneously made in the name of sixteen members of the Murray family and law firm on the same day for Justice Sweeney, and within a period of three days for Justice Pfeifer. Of the sixteen family members, nine are lawyers in the Murray law firm. Whenever a contribution was made in the name of one of the wives, the contribution had the exact same date as that of her husband. And the address of the Murray law firm was given for three of the contributions made in a wife's name – Louise, Shirley, and Martha (in addition, Michelle also gave the Murray law firm address on the contribution to Justice Sweeney) – despite the fact that, to the best of Conrail's knowledge, these individuals are neither members of nor employed by the firm. Whether the Murray family and their law firm made a deliberate and coordinated effort to contribute funding to each Justice's campaign, or whether the timing and methods of

contribution were a mere coincidence, is not relevant. Either way, the concurrent and common manner in which the Murray family members and law firm made their contributions creates an appearance of a single-source contribution from the Murray law firm.

Another unique characteristic is the close proximity between the Murray firm's contributions to the Justices' reelection campaigns and the firm's representation of Darlene Wightman in the pending appeal before those same Justices. The closer in time an attorney's campaign involvement is to his or her case before the judge, the greater the appearance of impropriety. This is particularly true where, as here, the case involves a significant amount of money. The Murray family and firm made their campaign contributions in January and February of 1998, at the time the jurisdictional memoranda in this case were pending before this Court, and just months prior to the oral argument.

Thus, the Murrays' contribution of $25,000 to Justice Sweeney and Justice Pfeifer was made in the midst of the Murray law firm's pending appeal to this Court. Whether by coincidence or design, the timing of the Murray contributions creates an additional basis for questioning the Justices' ability to be impartial under the circumstances. This is especially disconcerting where the contributors have a substantial financial interest in the outcome of the appeal, and where the legal issues before the Court (*e.g.*, the ability of a plaintiff to cross-appeal from a remittitur that she or he has accepted, and the availability of substantial punitive damages in a wrongful death case) are critical not only to this case, but also to the Murray law

firm's future representations of plaintiffs and to the Ohio plaintiffs' bar in general.[14]

Several courts have considered the timing of the attorney's involvement in the presiding judge's campaign to be an important factor in assessing the appearance of impropriety. See, *Collier v. Griffith* (Tenn. Ct. App. Mar. 11, 1992), 1992 Tenn. App. LEXIS 245, at *17-18 (disqualification warranted where counsel was serving as the finance chairman for the judge's reelection campaign when case was decided); *Barber v. MacKenzie* (Fla. App. 1990), 562 So. 2d 755 (disqualification mandated where attorneys were party members of judge's contemporaneously active campaign committee and where there is a "substantial and continuing relationship between the Committee and the trial judge"), *review denied* (Fla. 1991), 576 So. 2d 288; *Caleffe v. Vitale* (Fla. App. 1986), 488 So. 2d 627, 629

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[14] At the oral argument in this case, Paul O. Scott, Esq. (of Clark, Perdue, Roberts & Scott in Columbus, Ohio) and Allen Schulman, Jr., Esq. (of Leeseberg Maloon Schulman & Valentine in Columbus, Ohio and of Allen Schulman and Associates in Canton, Ohio) were present. The argument list for that date did not show any case on the list for which these individuals or their firms had entered an appearance. The Ohio Campaign Finance Reports of Paul E. Pfeifer and Francis E. Sweeney (included as Exhibits B and D in the separately-bound appendix hereto) indicate that the Clark, Perdue firm and the combined Leeseberg Maloon and Allen Schulman firms, along with the members and spouses of the members of those firms, each made contributions to each of these Justice's campaigns in excess of $20,000. The presence of other leading Ohio plaintiffs' attorneys in the courtroom during the oral argument suggests the importance of the issues to the Ohio plaintiffs' bar.

(disqualification appropriate where relationship between judge and attorney was ongoing at time of underlying lawsuit). The concurrent timing of the Murray law firm and family's contributions and of the pending appeal further tips the scales toward an appearance of partiality.

CONCLUSION

The $25,000 campaign contributions of the Murray family and law firm to the campaigns of Justice Sweeney and Justice Pfeifer essentially do an end run around the restrictions in Canon 7 of the Ohio Judicial Code of Conduct, and dilute the built-in safeguards that protect against this precise appearance of impropriety. The Court should meet the standard articulated by Chief Justice Moyer in *In re Disqualification of Character* and ensure the public's confidence in the integrity of the judiciary by holding that the contributions made by the Murray family and firm create such an appearance of impropriety as to require recusal. To allow the litigation to proceed with

Justice Sweeney and Justice Pfeifer presiding might well cause Ohioans further to question their elected judiciary.

Respectfully submitted,

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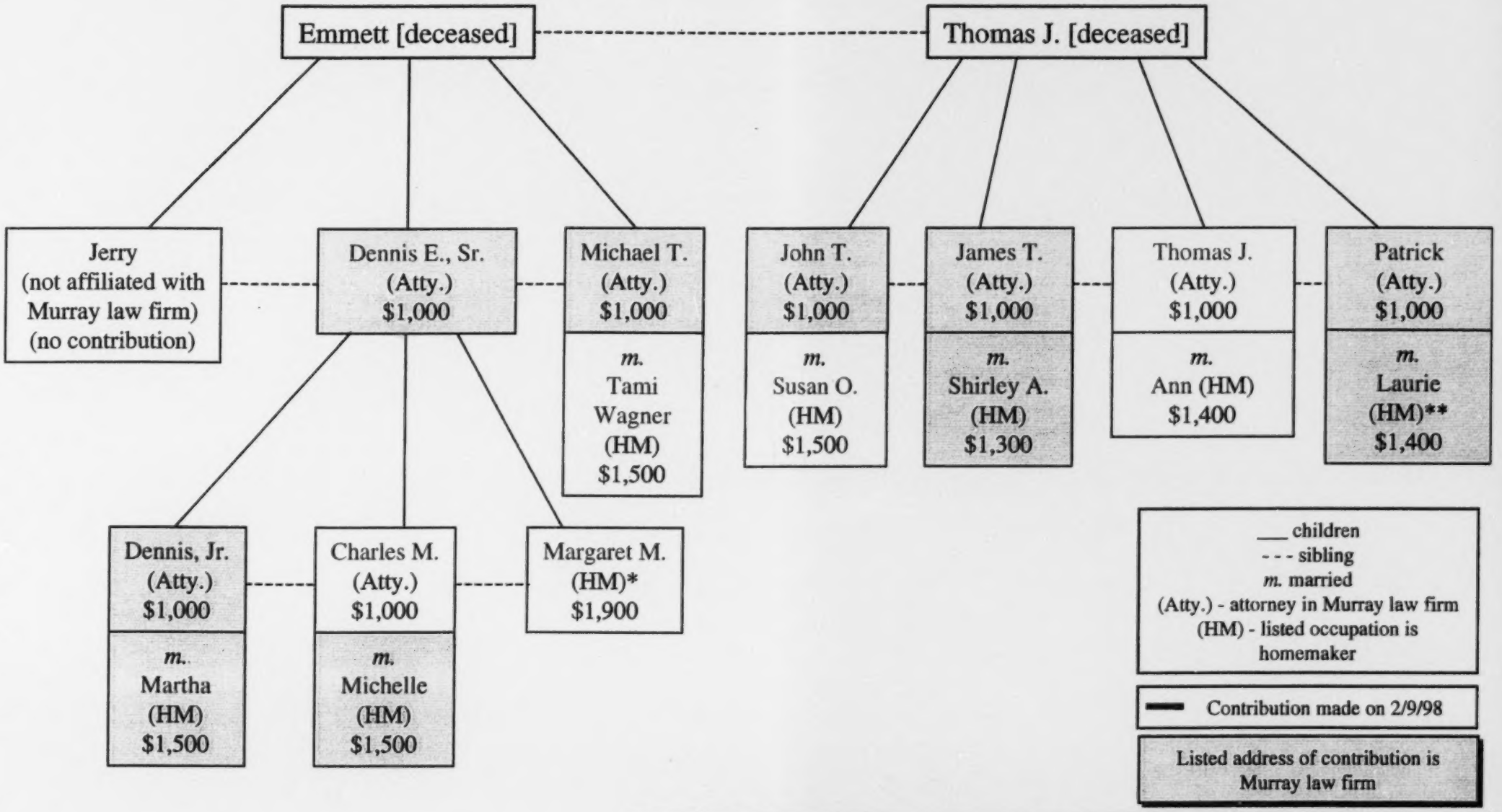
Dated: January 7, 1999.

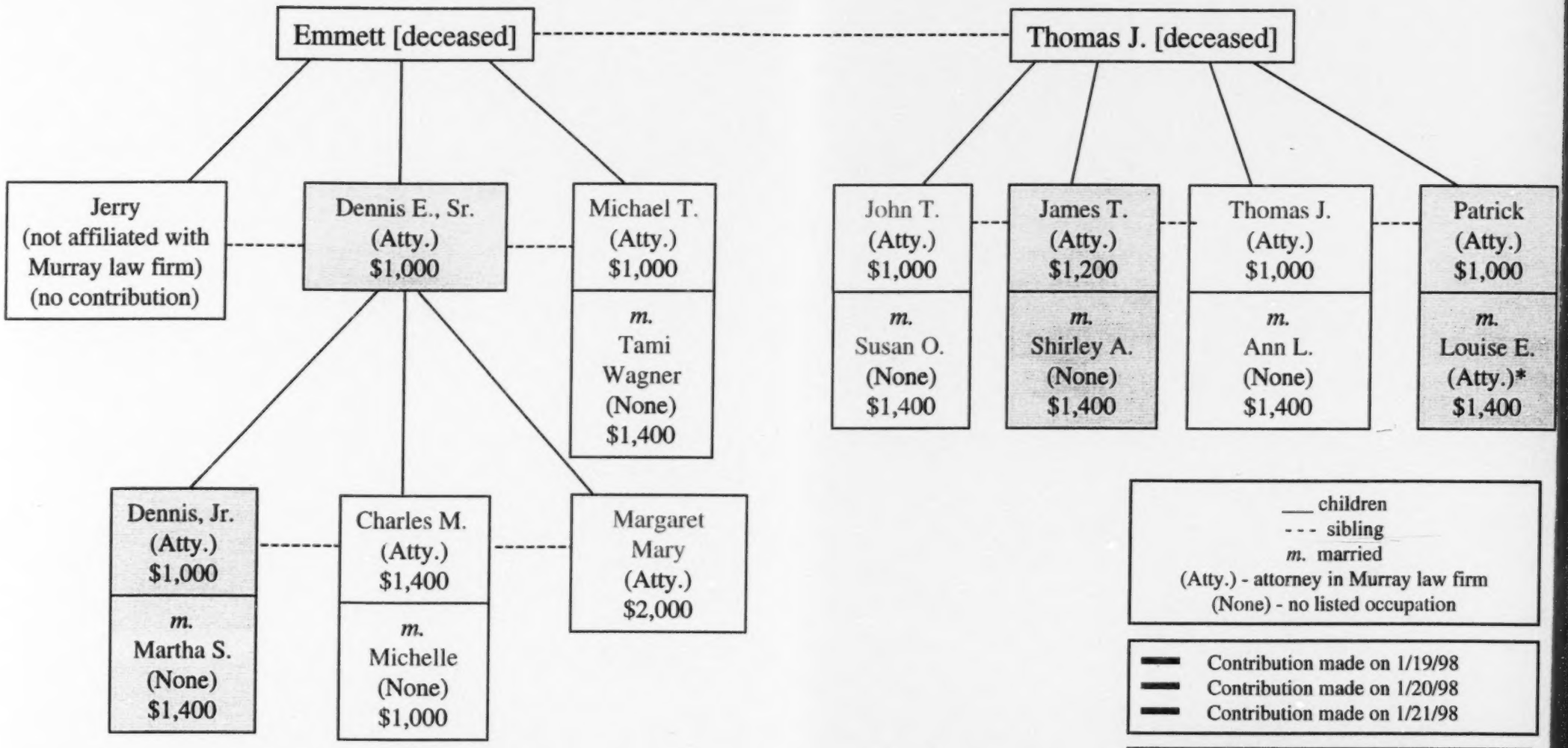
Murray Family 1998 Contributions to the Francis E. Sweeney Campaign



* The Martindale-Hubble Law Directory lists Margaret M. Murray as an attorney, and as a member of the Murray law firm. In addition, Margaret M. Murray is listed as an attorney in the contribution reports of Justice Pfeifer.

** Laurie Murray is listed as Louise E. Murray and as an attorney in the contribution reports of Justice Pfeifer.

Murray Family 1998 Contributions to the Paul E. Pfeifer Campaign



MOTION FILED

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(2)

No. 99-950

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of Michelle L. Wightman, Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* THE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF THE ALLIANCE OF AMERICAN INSURERS AND NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITIONER.

Pursuant to Rule 37.2 of the rules of this Court, the Alliance of American Insurers and National Association of Independent Insurers respectfully move this Court for leave to file the attached brief *amici curiae* in support of the petitioner, Consolidated Rail Corporation (hereinafter "Conrail"). Petitioner consented to the filing of this brief. Respondents Darlene M. Wightman, Administratrix of the Estate of Michelle L. Wightman, Deceased and Michelle Wightman Charitable Foundation withheld their consent.

The Alliance of American Insurers (hereinafter "Alliance") and the National Association of Independent Insurers (hereinafter "NAII") represent the leading voices of the insurance industry. They rank as two of the largest property-casualty insurance trade associations in the nation. NAII is the largest in terms of membership and total premium dollars written by its members. The Alliance and NAII combined represent over 700 insurance companies across the United States.

Members of the Alliance and NAII transact business, offer insurance products, investigate claims, mediate and settle disputes, and provide legal defense to millions of corporate and individual policyholders across the United States. Companies of every size and type comprise the Alliance and NAII, from companies that conduct business in limited geographic regions to large commercial enterprises that transact business from coast to coast.

Given their national presence and daily interaction with our nation's state and federal courts, members of the Alliance and NAII are deeply concerned about issues involving access to justice, the partnership between our federal and state courts, the integrity of our nation's courts, and the fundamental protections guaranteed under the Due Process Clause.

Amici are deeply concerned about this matter because petitioner's procedural and substantive due process rights were unheeded by the Ohio Supreme Court. Procedurally, petitioner was denied an opportunity to be heard. Substantively, petitioner's due process rights were violated when plaintiff's counsel, family members of plaintiff's counsel, and plaintiff's Counsel's law firm, made substantial campaign contributions to the campaign committees of two of the sitting state court justices. These campaign contributions were made during the pendency of the appeal. Amici are greatly concerned that in the absence of meaningful review, the timing, magnitude, and sources of these contributions will accentuate negative public sentiment toward the judiciary. This negative sentiment poses a real threat to the concept of "Our Federalism."

In addition, the Amici support the total abolition of punitive damages, or in the alternative reasonable limits to the award of punitive damages, as they have a severe negative impact on member companies and their policyholders. Amici are also concerned that this case presents another instance where a jury was left to award punitive damages without any delineation of when such a punitive damage award violates due process. The Alliance and NAII are further concerned over the negative

economic and business repercussions that result when state courts uphold grossly excessive punitive damage awards which are 6,250 times greater than the compensatory award.

In view of these concerns, the Alliance and NAII respectfully request that they be allowed to participate in this case and to file the attached brief *amici curiae* in support of petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The interest of *amici curiae* the Alliance of American Insurers and the National Association of Independent Insurers is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

Federal and state courts are kindred systems, joined in purpose by the doctrine of "Our Federalism." The Federalist No. 82 (Hamilton). This extraordinary partnership empowers state courts to serve as coequal guardians of our constitutional rights. Vested with this solemn authority, state courts share a vital responsibility to uphold the Constitution as supreme and to zealously ensure that all litigants enjoy the fundamental protections of a fair and impartial tribunal. Sadly, these sacred principles were overlooked by Ohio's highest court.

Conrail filed a motion to recuse/disqualify certain members of the Ohio Supreme Court after it learned that plaintiff's counsel, family members of plaintiff's counsel, and plaintiff's law firm made substantial contributions to the campaign committees of two members of that court. The contributions were made during the appeal. Rather than address Conrail's challenge to these contributions, the Ohio Court remained silent on this issue, then ruled

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation and submission of this brief.

in favor of the plaintiffs on the merits of this case. Understandably, this silence heightened Conrail's concern that it was denied due process.

Amici are troubled by this judicial silence, and agree that when state courts turn a blind eye to allegations of bias or prejudice, due process protections are rendered meaningless. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). Here, fundamental notions of fairness compelled the Ohio Court to uphold the Fourteenth Amendment, follow well established precedent, and to speak the truth in response to the questions raised by petitioner. The Constitution demands no less. Amici request that the petition be granted so Conrail may receive the constitutional protections it is due.

Amici also believe the Ohio court's refusal to consider Conrail's due process motion ignores this court's teachings in *Martin v. Hunters Lessee*, 14 U.S. 304 (1816), and violates the spirit, letter, and underlying rationale upon which the doctrine of "Our Federalism" was created. Amici believe that if we allow state courts to remain silent in the face of fundamental due process challenges, we will have effectively undermined the sanctity of "Our Federalism."

Amici are also concerned that the Ohio court's silence will heighten public perception that substantial campaign contributions may tip the scales of justice. Such extreme circumstances foster public resentment and distrust of all judicial proceedings. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Amici also support this petition to afford Conrail its procedural and substantive due process rights.

Finally, the punitive damage award assessed against Conrail, in an amount 6,250 times greater than the associated compensatory damage award, is grossly excessive and violates numerous holdings of this Court. While this Court has recognized the extreme difficulty associated with delineating a specific "line" at which punitive damage awards are unconstitutional, it is abundantly clear that a ratio of punitives that is 6,250 times compensatory, obliterates any ratio previously upheld by this Court. Amici support Conrail's petition and request that this Court correct the errors below.

For the foregoing reasons, Amici respectfully request that Conrail's petition be granted so this Court may address the constitutional and national issues present in this case.

ARGUMENT

THE OHIO SUPREME COURT'S REFUSAL TO ADDRESS PETITIONER'S DUE PROCESS CHALLENGE THREATENS PRINCIPLES OF "OUR FEDERALISM."

The paradigm of "Our Federalism" recognizes that state supreme courts stand alongside federal courts as coequal guardians of justice. *See, e.g., Younger v. Harris,* 401 U.S. 37, 44 (1970); The Federalist No. 82 (Hamilton). This solemn authority carries with it the vital responsibility to recognize federal law as supreme, *Gulf Offshore Co. v. Mobil Oil Corp., et al.,* 453 U.S. 473, 478 (1981), and to zealously guarantee that all litigants enjoy a fair process which they are guaranteed under the Constitution of

the United States. The Ohio Supreme Court's failure to meet this sacred obligation jeopardizes the partnership between our federal and state courts and violates the basic guarantees our Constitution affords to all.

This Court has long held that the partnership between our federal and state court systems is premised on the relationship between our national government and states and that the two court systems exercise concurrent sovereignty. *Gulf Offshore Co. v. Mobil Oil Corp., et al.*, 453 U.S. 473, 478 (1981). Under the concurrent sovereignty doctrine, the Ohio Supreme Court could not be silent. *See, e.g., Gulf Offshore Co. v. Mobil Oil Corp., et al.*, 453 U.S 473, 477-478 (1981).

The framers of the Constitution did contemplate that state courts would address cases within the judicial cognizance of the United States in the exercise of their ordinary jurisdiction. *Martin v. Hunter's Lessee*, 14 U.S. 304, 340 (1816). The framers believed that judges of the state courts are, and always will be, of as much integrity, wisdom and learning as those of the court of the United States, and based on this highest level of confidence, fully expected state court judges would be called upon to make rulings based on federal law. *Martin v. Hunter's Lessee*, 14 U.S. at 346-347. By design, state courts were to decide both issues brought under state law and issues brought under the Constitution of the United States – "the supreme law of the land." *Martin v. Hunter's Lessee*, 14 U.S. at 340; *Younger v. Harris*, 401 U.S. 37, 52 (1971).

These pillars of integrity, wisdom and learning continue to uphold our founding fathers' vision. A weakening of any one pillar jeopardizes this hallowed principle.

This Court recently noted that in the age of campaign contributions to elected state officials, the pillar of integrity is subject to constant attack. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Integrity can be diminished by a political quid pro quo, the impact of the appearance of corruption, and any influence that may tempt elected officials to act contrary to their obligation of office. *Nixon v. Shrink Missouri Gov't Pac, et al.*, ___ U.S. ___ (2000). Amici believe elected state officials, and especially judges, must be ever vigilant to preserve the pillar of integrity.

This Court must review whether the Ohio Supreme Court's silence, in response to petitioner's challenges to the substantial campaign contributions, erodes the pillar of integrity. The law bars state supreme courts from selectively enforcing constitutional protections within their courtrooms. Otherwise, litigants will inevitably experience a patchwork of disparate rulings on rights that are universally guaranteed. Forum shopping between the states and forum shopping to the federal bench will disrupt the basic precepts of Our Federalism, and further erode the pillar of integrity.

This threat to the pillars upholding Our Federalism and the concurrent jurisdiction of state and federal courts to uphold the Constitution warrants this Court's review and is a compelling reason to grant Conrail's petition for writ of certiorari.

THE OHIO SUPREME COURT'S SILENCE IN RESPONSE TO PETITIONER'S MOTION TO DISQUALIFY VIOLATES DUE PROCESS UNDER ANY TEST THIS COURT HAS EXPATIATED.

Generally, a state possesses the power to regulate the administration of justice within its jurisdiction. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977). This power is subject only to the limitations of the Constitution. *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

This Court has zealously protected the fundamental rights afforded by our Constitution and closely guards the supremacy of our Constitution through its review authority. Throughout this nation's history, this Court has reviewed attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. *Joint Anti-Fascist Refugee Committee v. McGrath, et al.*, 341 U.S. 123, 161 (1951).

In these circumstances where litigants have raised a due process challenge upon the judiciary itself, this Court has repeatedly held due process requires that all courts be neutral, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), objective, *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J. concurring), and fair. *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). These essential elements of due process guarantee that all courts will apply the law with integrity, fairness and impartiality. These critical elements further guarantee that due process rights are protected in specific circumstances. This Court has espoused two tests to ensure that the essential elements of due process are satisfied in all judicial proceedings. These tests provide lower courts

with absolute rules when a litigant questions possible bias or favoritism within a court.

This Court's first test holds that a due process violation occurs where there is a mere possibility that a tribunal is biased. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). In *Tumey*, this Court held that anything that may possibly tempt a judge "not to hold the balance nice, clear and true" violates due process. *Tumey*, 273 U.S. at 532. This Court has applied this mere possibility test to disqualify justices even though they have no actual bias and they fairly apply the law to all. *In Re Murchison*, 349 U.S. at 136. This Court has reasoned that, in specific cases, disqualification is necessary because "justice must satisfy the appearance of justice." *In Re Murchison*, 349 U.S. at 136; *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980); *Offutt v. United States*, 348 U.S. 11, 14 (1954).

This Court's second test holds that due process is violated where a court has an actual bias in a case pending before it. *Aetna Life Insurance Co. v. Lavoie, et al.*, 475 U.S. 813 (1986). "Actual bias" means a direct, personal, substantial and pecuniary interest in the matter. *Lavoie, et al.*, 475 U.S. at 824. Under this test, this Court held that due process does not tolerate a judge to act as "a judge in his own case." *Lavoie, et al.*, 475 U.S. at 824.

This Court has also declared that specific cases may require that both tests be applied. In *Taylor v. Hayes*, 418 U.S. 488, 501 (1974), this Court held that a due process inquiry required review of actual bias in addition to the appearance of bias. Justice Frankfurter in *Public Utilities Commission v. Pollack*, 343 U.S. 451, 466-467 (1952),

believed due process is violated where there is any hint of bias, no matter how remote.

Here, petitioner raised concerns that the campaign donations made to the campaign committees of two Ohio Supreme Court justices by opposing counsel and members of opposing counsel's family and firm during the pendancy of the case may have created the appearance of bias. Petitioner's concerns regarding the contributions were fully briefed and filed with the Ohio Supreme Court. See Ohio Supreme Court docket, Case 97-2342. Obviously, this issue was of such importance that respondent filed a brief in opposition with the court.

Inexplicably, the Ohio Supreme Court never addressed petitioner's due process concerns. It applied no test, no analysis, no explanation. It did not speak. See Ohio Supreme Court docket, Case 97-2342. Rather, the Ohio Supreme Court erroneously turned a blind eye to petitioner's concerns and the briefs of both parties. This inaction warrants this Court's review.

Due process protections and the intentions of the drafters of the Constitution are rendered meaningless, in cases such as these, if state courts are permitted to maintain silence when constitutional issues are raised before them. Litigants must be heard and courts must respond. Here, the Ohio Court had a duty to speak. The Constitution of the United States demands no less. This Court has consistently found due process violations to exist upon a showing that only a "probability of unfairness" existed in a tribunal. Accordingly, amici believe that due process contains no prerequisite that there be a finding of actual

bias in this case for petitioner's due process to have been violated.

Consequently, amici urge this Court to grant review of this case because petitioner's due process rights were violated. Silence is inconsistent with principles of neutrality, fairness and objectivity. Amici aver that the Due Process Clause affords absolute protections for litigants to be heard and for courts to respond where the integrity of the process is questioned. Our Constitution bars even the probability of unfairness. *Withrow*, 421 U.S. at 47, citing *In re Murchison*, 349 U.S. 133, 136 (1955). Any possibility that a judge or decision-maker may be biased is too high to be constitutionally tolerable. *Withrow*, 421 U.S. at 47.

Here petitioner was clearly denied such full protections. Only this Court can now correct this error. Therefore, amici respectfully request that Conrail's petition be granted.

A PUNITIVE DAMAGE AWARD IN AN AMOUNT 6,250 TIMES GREATER THAN THE ASSOCIATED COMPENSATORY DAMAGE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

This Court has consistently held that the due process clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may go," *TXO Production Corp. v. Alliance Resources Corp., et al.*, 509 U.S. 443, 453 (1993); *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73 (1907), yet has refrained from devising a mathematical "bright line" between the constitutionally acceptable and the constitutionally unacceptable. *TXO*, 509 U.S. at 457.

Here, the Ohio Supreme Court affirmed a punitive damage award that is clearly unconstitutional and exceeds any mathematical "bright line."

The Due Process Clause of the Fourteenth Amendment limits the size of punitive damage awards. *See, Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). A state exceeds that limit when its court imposes a "grossly excessive punishment on a tortfeasor." *BMW v. Gore*, 517 U.S. 559, 582 (1996). There must be a reasonable relationship between the punitive damage award and the compensatory award upon which it is based. *BMW*, 517 U.S. at 582. A ratio of punitive to compensatory damages of four to one was found to be "close to the line" but still constitutionally permissible. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991). A ratio of ten to one was found not to be "grossly excessive," *TXO*, 509 U.S. at 462, but this Court found a ratio of 500 to 1 breathtaking and unconstitutional. *Gore*, 517 U.S. at 583 (quoting *TXO*, 509 U.S. at 481 (O'Connor, J. dissenting)). Here, the ratio of punitive to compensatory damages is 6,250. This imbalance obliterates any ratio that this Court has held to be constitutional.

Punitive damages must be in proportion to the severity of the offense. *TXO*, 509 U.S. at 462. It is undisputed that (1) petitioner had operating rules in place at the time of the accident which required its train crews to flag a grade crossing when a train, stopped within 300 feet of a crossing, may obstruct a motorist's view of oncoming trains on adjacent tracks; (2) petitioner regularly tests its employees on its operating rules; (3) petitioner punished employees that disregarded its rules in this case; (4) since

the Wightman accident, petitioner has engaged in programs designed to make grade crossings safer, make accidents less likely, and make sure its employees are trained properly.

Punitive damages serve to punish and deter. On these facts, a $15,000,000 punitive damage award serves neither purpose. Here, the damage at issue was accidental property damage to a nine-year-old vehicle valued at approximately $2,400. This Court has held the Constitution requires that punitive damages be in proportion to the severity of the offense. Those guarantees were not enforced here. Accordingly, this issue warrants this Court's review.

CONCLUSION

This case clearly warrants this Court's review. The process by which the Ohio Supreme Court affirmed a $15 million punitive damage award was constitutionally invalid and violated petitioner's due process. The Ohio Supreme Court was afforded the opportunity to address petitioner's due process challenges, but did not. Inexplicably and without reason, the Ohio Supreme Court turned a blind eye to petitioner's concerns that the appearance of bias may have tainted the court, and then affirmed an unconstitutionally excessive punitive damage award. Silence in this regard is unconstitutional under any test or definition of due process this Court has expatiated. For the reasons heretofore stated, Amici

respectfully request that Conrail's petition for writ of certiorari be granted.

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CONSOLIDATED RAIL CORPORATION,
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v.

DARLENE M. WIGHTMAN Administratrix of the Estate of Michelle L. Wightman Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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v.
DARLENE M. WIGHTMAN Administratrix of the Estate of Michelle L. Wightman Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondents have refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an issue of great significance to the

[1] The letter expressing consent has been filed with the Clerk of the Court.

railroad industry as a whole—and in those instances such requests have been granted.[2]

In this case, an AAR member was assessed $15 million in punitive damages after a trial at which it was deprived of its constitutional right to defend itself. The Ohio Supreme Court ultimately let stand this punitive damages award, which exceeded the underlying compensatory damages award by 6,250 times. In approving this grossly excessive award, the court denied petitioner due process by failing to pay heed to the constitutional parameters governing the awarding of punitive damages, which have been enunciated in recent decisions of this Court. The constitutional infirmities of the decision below are of particular concern to the railroad industry because railroads are increasingly finding themselves to be the targets of lawsuits seeking massive punitive damages awards.

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue. AAR works closely with its member railroads' litigation counsel on issues typically associated with railroad litigation. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of nearly 1000 attorneys representing railroad companies in personal injury litigation. Therefore, AAR is thoroughly familiar with the trends and problems associated with railroad litigation, and in particular the looming specter of punitive damages facing railroads today.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the

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[2] *E.g.*, *Consolidated Rail Corp. v. Wicker*, 119 S. Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh*, 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. Co. v. Chittum*, 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley*, 117 S. Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae*.

impact of the lower court's rulings, by bringing the perspective of an entire industry, which often is different from that of the individual litigant who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous and constitutionally flawed decision, but also in establishing precedent that will be beneficial to all railroads that may face trials on punitive damages in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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February 1, 2000

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IN THE

Supreme Court of the United States

No. 99-950

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

DARLENE M. WIGHTMAN Administratrix of the Estate of Michelle L. Wightman Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF AMICUS CURIAE

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 per cent of the rail industry's line haul mileage, produce 93 per cent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party authored this brief in whole or in part.

One matter which is a serious and growing concern to railroads is the frequency with which juries are punishing defendants in general, and railroads in particular, in civil litigation through the imposition of substantial punitive damages awards. Railroads have a presence in 49 states, where 559 freight railroads operate over nearly 170,000 miles of track.[2] If an accident occurs involving a member of the general public, railroads often are subject to lawsuits under state law.[3] In 1998, railroad accidents and incidents involving the general public resulted in 1047 lawsuits being filed against railroads.[4] Railroads are tempting targets for punitive damages because their extensive interstate operations often puts them in a position to be portrayed in the litigation as wealthy out-of-state corporations. *See infra* pp. 7-9.

AAR has a particular interest in this case because it resulted in an award of substantial punitive damages against one of its member railroads following a trial marred by highly prejudicial errors left undisturbed by the state's highest court. These errors amounted to not

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2 Association of American Railroads, *Railroad Facts* 3 (1999 ed.). Amtrak, the nation's intercity passenger railroad, operates over 24,500 miles of track, most of which is owned by freight railroads. *Id.* at 77. The most common interaction between trains and the general public occurs at highway-rail grade crossings. As of 1998, there were 158,590 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998 (1998 Safety Satistics)*, ch. 9, p.6 (July 1999) (Table 9-1).

3 Railroads generally are regulated under federal law, including the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, which covers workplace injuries. However, state tort law usually applies in cases where non-employees are injured, though, depending on the circumstances, some claims may be preempted. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

4 Association of American Railroads, *1998 Claim & Litigation Report* 3-7 & 3-8 (Aug. 1999).

just a misapplication of state law and procedure, but also rose to the level of a violation of the constitutional rights of the defendant. As a representative of a significant portion of the rail industry, AAR has an interest in assuring that such proceedings are not conducted in a way that deprives railroads of their right to present an adequate defense as required by the United States Constitution.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

The Due Process Clause prohibits states from assessing excessive punitive damages awards. In this case, arising from an accident at a grade crossing, the judge prohibited petitioner from presenting important, relevant evidence about the circumstances surrounding the accident. As a result, without hearing evidence that was essential to its ability to assess the reprehensibility of the petitioner's conduct—the most important factor in determining whether an award of punitive damages is excessive—the jury awarded the plaintiff $25 million in punitive damages (which was reduced to $15 million by the trial judge).

In recent years, railroads have had a number of immense punitive damages awards assessed against them, typically in cases arising from grade crossing accidents. Crossing accidents are unique, and the culpability of both the railroad and the motorist can only be properly assessed if all the facts and circumstances of the accident are presented to the jury. Allowing a jury to determine the amount of punitive damages to be awarded without permitting a railroad to present in its defense evidence about how the accident happened amounts to a deprivation of due process.

Petitioner was also deprived of its right to due process because the judge permitted the plaintiff's expert witness to offer evidence (about which plaintiff's counsel reminded the jury at closing argument) that over 1000 accidents, similar to the one in this case, had occurred in the past. However, no evidence was offered to connect petitioner with any of these past accidents or even to suggest that petitioner was aware of them. This error by the judge enabled the jury to punish petitioner for the alleged acts of other parties, a violation of due process.

ARGUMENT

I. RAILROADS HAVE A STRONG INTEREST IN ASSURING THAT DUE PROCESS IS AFFORDED BEFORE A STATE MAY IMPOSE A SUBSTANTIAL PUNITIVE DAMAGES AWARD

In this case, petitioner was assessed a penalty of $15 million after a trial in which it was prevented from telling the jury its side of the story. *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999). Whether petitioner ultimately is deserving of punishment for its conduct related to the grade crossing accident from which this case arose is not a question for this Court. However, that the proceeding which resulted in this punishment was fundamentally unfair should be of serious concern to this Court, which has held that "it is not disputed that a jury award [of punitive damages] may not be upheld . . . if it was reached in proceedings lacking the basic elements of fundamental fairness." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 9 (1991) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)).[5]

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[5] This Court has left no doubt that the Due Process Clause of the Fourteenth Amendment is applicable to the awarding of puni-

In *BMW of North America v. Gore*, 517 U.S. 559 (1996), this Court held that the Due Process Clause "prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor" 517 U.S. at 562,[6] and articulated three guideposts which are relevant to the question of whether an award of punitive damages is consistent with constitutional principles: the reprehensibility of the conduct to be punished; the disparity between the compensatory and punitive damages awards; and the difference between the punitive damages and civil or criminal penalties that could be imposed for comparable misconduct. 517 U.S. at 574-75. At least in some cases, these guideposts have resulted in greater scrutiny of punitive damages awards by appellate courts.[7] However, a reviewing court is removed from the evidence and testimony heard by the members of a jury actually charged with awarding punitive damages. The nature of that evidence cannot but greatly affect how the jury members view the facts of a case, and, in particular, how they assess "the degree of reprehensibility of the defendant's conduct," which this Court has stated is "the most important in-

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tive damages. *BMW of North America v. Gore*, 517 U.S. 559 (1996); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Haslip supra*, and that proceedings to determine the amount of punitive damages must be conducted in a manner that provides "assurances that those whose conduct is sanctionable by punitive damages are not subjected to punitive damages of arbitrary amounts." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994).

[6] Specifically, a party must "receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574.

[7] *See, e.g., Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997) ($5 million punitive damages award reduced to $350,000); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 1846 (1997) ($30 million punitive damages award reduced to $6 million).

dicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. Moreover, reviewing courts cannot effectively ascertain whether the *Gore* guideposts warrant affirmance or reversal of a punitive damages award when key evidence has been improperly excluded (or admitted).

The case below is a stark case in point. The trial court's failure to adhere to the basic constitutional principles that must be followed in trials on punitive damages deprived petitioner of its right to present vital and relevant evidence to defend itself against punishment.[8] (Not surprisingly, the jury returned an award that, even after a subsequent remittitur, exceeded the compensatory award by over 6,000 times.) Therefore, as petitioner argues, this case presents an excellent opportunity for this Court to provide important guidance on the rights of defendants to present evidence in their favor when they stand at risk of punitive damages in a civil proceeding. Such guidance is urgently needed because civil lawsuits have become a common forum for punishing conduct deemed wrongful, making this an issue of vital and immediate interest to railroads, and by all accounts, to other potential defendants, be they private business corporations or other corporate and non-corporate entities.

A. Railroads Have Increasingly Become Targets for Punitive Damages

The railroad industry has seen great innovation since the days when steel wheels and rail came together to form a new mode of transportation. And, as they prepare to

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[8] The unfairness of the trial was further compounded by the Ohio Supreme Court's refusal to address, much less act on, petitioner's motion seeking the recusal of two members of the court who had been the beneficiaries of substantial campaign contributions from the plaintiff's lawyer, his partners and their families during the pendency of the appeal. *See Petition for Certiorari*, Part I.A.

enter a new century, railroads are relying increasingly on sophisticated computerized systems. However, the basic technology has remained the same, and still serves the industry in good stead. Rail operations involve the movement of heavy equipment, in all kinds of environments, in some cases hauling hazardous materials, in proximity to employees, passengers and, frequently, the general public. Despite the industry's vastly improved safety record over the past two decades,[9] given the nature of rail operations some accidents are inevitable. Just as inevitable are lawsuits, which, with increasing frequency, seek punishment in addition to compensation.

Recently, the railroad industry has been shocked by enormous, and heretofore unheard of, awards of punitive damages. Earlier this year, a Missouri jury awarded the staggering sum of $120 million in punitive damages to a plaintiff injured in an accident at a rail-highway grade crossing between an Amtrak train and an automobile in which she was a passenger. *Alcorn v. Union Pacific R.R.*, No. CV-97-31927 (Circuit Court, Jackson County, Mo.) (the court has reduced the award of punitive damages to $50 million.) Another award of $50 million in punitive damages was returned by a jury, and affirmed by an appellate court, in a Florida wrongful death action arising from the derailment of an Amtrak train in South Carolina. *Palank v. CSX Transp., Inc.*, 1999WL641885 (Fla. App. 4 Dist.) (1999) (unpublished opinion).[10] Of almost

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[9] During the past twenty years, the number of railroad accidents declined by 72 percent, Federal Railroad Administration, *Accident/Incident Bulletin, Calendar Year 1979* at 9 (1980) (Table H3) and *1998 Safety Statistics* at ch. 1, p. 7 (Table 1-1), and the number of fatalities from grade crossing accidents decreased by 48 percent. Federal Railroad Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1979* at 8 (1980) (Table 3) and *1998 Safety Statistics* at ch. 7, p. 6 (Table 7-1).

[10] The punitive damages award in *Palank* was upheld despite a Florida statute containing a general cap on punitive damages.

equal size was a punitive damages award of $44 million in a case arising from a crossing accident in El Paso, Texas. *Atchison, Topeka & Santa Fe Ry. Co. v. Cruz.*, No. 08-97-00639-CV (County Court at Law No. 4, El Paso County, Tx.) (An appellate court subsequently struck the award of punitive damages. The case has been appealed to the Texas Supreme Court.)

In another case, petitioner was assessed $6 million in punitive damages as the result of a crossing accident in which it was alleged to have failed to install adequate warning devices at a crossing which had been upgraded with federal funds. *Garrett v. Consolidated Rail Corp.*, 697 N.E.2d 1109 (Ohio App. 1997). The award of punitive damages in *Garrett* was particularly troublesome for the industry, not only because of the immense disparity between the compensatory and punitive damages,[11] but also because the court held that Conrail could be liable for punitive damages because it did not "voluntarily [take] steps to evaluate the safety of its crossings nor independently upgrade its hazardous crossings without an order from the PUCO" (the state agency with jurisdiction over rail-highway grade crossings). 697 N.E.2d at 1124. This multimilion dollar award of punitive damages was affirmed by a state appellate court despite the fact that at the time of the decision, the Fifth, Eighth and Tenth Circuits all had clearly held that where federal funds participate in the installation of crossing warning devices, state law duties to install different or addi-

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[11] As was the case here, in *Garrett*, the punitive damages award was based on a small compensatory damages award for property loss—in that case, of $100—used by the plaintiff as a stalking horse for an appeal to the jury to deliver a massive punitive damages award on a wrongful death claim which, under Ohio law, cannot serve as the basis for a punitive damages award. *See Petition for Certiorari* at 22, n.4. The resulting ratio of punitive to compensatory damages was 60,000 to 1.

tional devices are preempted.[12] Thus, Conrail was severely punished for conduct which, according to three federal courts of appeal (covering 16 states), would have given rise to no obligation in compensatory damages, let alone punitive damages.

Perhaps the most stunning verdict against a railroad was a punitive damages award of $2.5 billion in Louisiana in the case of a leaking tank car.[13] *In re: New Orleans Train Car Leakage Fire Litigation*, No. 87-16374 (Civil District Court for the Parish of Orleans, La.). This incident resulted in the precautionary, temporary evacuation of several thousand people from their homes, but caused no serious injuries. In a ruling on post trial motions, the court recently reduced the punitive damages award to a "mere" $850 million.[14]

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[12] *See Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996); *Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (8th Cir. 1996); *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (10th Cir. 1996). The issue of whether the participation of federal funds in a crossing upgrade is sufficient to trigger federal preemption of state law claims is currently before this Court. *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (6th Cir.), *cert. granted*, 120 S. Ct. 370 (Oct. 18, 1999).

[13] This represented the punitive damages against only one railroad, CSX Transportation. Additional punitive damages awards, exceeding $100 million, were made against other railroads with some connection to the incident. These other railroads ultimately settled the case while post trial motions were pending.

[14] Railroads can get hit with substantial punitive damages awards even when the plaintiff's conduct was largely to blame for the accident, as was the case here, and in another case where Conrail was assessed multiple seven-figure punitive damages awards arising from a crossing accident where the driver of the car was found to be 55% at fault. *Moore v. Consolidated Rail Corp.*, Nos. 1995CV 01185; 1995CV01196; 1996CV00016 (Court of Common Pleas, Stark County, Ohio), *aff'd*, Nos. 1996-CA-00317; 1996-CA-00323 (Ohio App. 1996), *discretionary appeal denied*, 688 N.E.2d 1043 (1998).

B. Punitive Damages Awards Cannot Be Assessed in Accordance With the Requirements of Due Process When the Jury is Not Presented With Evidence of All the Facts and Circumstances of an Accident

While punitive damages have been awarded in a variety of cases, recent experience shows that, as in the case below, accidents between trains and motor vehicles at grade crossings result in litigation in which punitive damages are most likely to be sought and awarded against railroads. There are nearly 160,000 public crossings in the United States. *See supra* note 2. The conditions at crossings vary greatly: some are in congested urban areas, some in sparsely populated rural settings.[15] For many crossings, safety means automatic gates and lights which are activated when a train is approaching and occupying a crossing; others are made safe with passive warning devices, such as crossbucks and a variety of signs, which alert motorists and pedestrians to the presence of railroad tracks.[16]

Certainly, every crossing accident is unique. These accidents occur under a wide variety of circumstances, at

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[15] The Federal Highway Administration, which oversees the Federal Grade Crossing Safety Program (23 U.S.C § 130) recognizes that the conditions and characteristics of crossings vary greatly. "Due to the large number of significant variables to be considered, there is no single system of active control devices universally applicable to crossings." U.S.DOT, Federal Highway Administration, *Rail-Highway Crossings Study* 4-9 (1989).

[16] Congress has concluded that with respect to tens of thousands of crossings characterized by low traffic volumes, "[f]ew . . . have sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. The Secretary of Transportation has reached the same conclusion. (For thousands of crossings, "there is but a remote possibility of finding adequate justification for other than minimum protection of a static sign type." U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem, at v (1971).)

crossings with all types of warning devices, during all times of day and at all times of year.[17] In each case, the conduct of both the motorist and railroad must be assessed in light of all the circumstances. Many factors, relating to both the condition of the crossing and the conduct of the motorist, are relevant to the potential danger posed by a railroad's conduct. In fact, given the characteristics of trains and motor vehicles, and the principles of physics, it is the driver who typically is in a far better position to avoid an accident.[18] Conduct of a party that appears reckless or egregious when presented from only one perspective, may be seen in a different light after all the evidence is heard.

In this case, the degree of reprehensibility of petitioner's conduct—that is, the degree to which its conduct created a hazard to the public—and, consequently, the degree to which petitioner was deserving of punishment, could only be fairly evaluated in light of all the circumstances surrounding the accident. Petitioner's inability to introduce evidence bearing on the circumstances of the accident deprived the jury of the opportunity to assess the

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[17] In 1998, accidents occurred at every hour of the day and night, and during each month of the year. *1998 Safety Statistics*, ch. 7, pp. 9-10 (Tables 7-4 & 7-6).

[18] In a comprehensive study of crossing accidents, the Interstate Commerce Commission found that the main cause of grade crossing accidents is the conduct of the motorist at the crossing. *See, Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicle*, ICC Report No. 33440, 322 I.C.C. 1, 63 (1964). The ICC further found that

> As between the engineer and the driver of a motor vehicle, the latter is in a far better position to control the movement of his vehicle than is the engineer of a train because of the difference between the adhesion of the train wheels to the rail and the contact between the motor vehicle wheels and the roadway.

Id. at 77-78.

reprehensibility of petitioner's conduct with all the relevant evidence before it. Had petitioner not been so restricted, it would have offered evidence that under the circumstances at the crossing on the night of the accident a motorist could have seen the approaching train in enough time to avoid the accident, and that the plaintiff's inexperience and impaired state, due to alcohol consumption, made the accident far more likely to occur. Surely, if it was relevant for the jury to hear from plaintiff's expert that petitioner's conduct made an accident inevitable, it was equally relevant for the jury to hear the defendant's expert testimony to the contrary.

This one-sided proceeding deprived petitioner of due process in accordance with the constitutional principles that guarantee the right to present witnesses in a party's defense. Indeed, when presented with evidence by both parties, the first jury (sitting in the liability phase of the trial) found plaintiff's contributory negligence to be 40 percent of the cause of the accident,[19] and the trial judge found that petitioner's conduct warranted no punitive damages [20]—a far cry from the results at the second trial. Regardless of whether the second jury would have found

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[19] While the Ohio Supreme Court dismissed the significance of this issue by narrowly defining it as a question of whether contributory negligence was at issue in the trial on punitive damages, 715 N.E.2d at 551, it is certainly significant, and has a bearing on the character of petitioner's conduct, that the jury which heard all the evidence found the plaintiff's conduct was almost as much to blame for the accident as was petitioner's conduct. *Cf. Chambers v. Mississippi*, 410 U.S. 284 (1973) (The state's hearsay and other rules of evidence may not be used to prevent a defendant from putting on relevant and reliable evidence in his defense.)

[20] Over petitioner's objection, this fact also was kept from the second jury, despite the Ohio Supreme Court's agreement that the "trial judge is in the best position to determine whether an award is so excessive as to be deemed a product of passion or prejudice. (citation omitted)" 715 N.W.2d at 553.

petitioner's evidence greatly persuasive, or discounted it entirely, fairness required that it should have been presented.

The emasculation of petitioner's defense at the second trial made it easy for the jury to improperly return a verdict based only on plaintiff's version of the facts. This erroneous deprivation of petitioner's right to due process led to an unconstitutionally excessive punitive damages award. As the dissent in the Ohio Supreme Court properly pointed out: "Due process and fundamental fairness require that the jury be informed of all of the circumstances in order to fully evaluate the defendant's conduct. . . . The second jury, in essence, heard only the plaintiff's version of the events." 715 N.E. 2d at 560 (Lundberg Stratton, J. dissenting).

C. Punitive Damages Awards Cannot Be Assessed in Accordance With the Requirements of Due Process When the Jury is Presented With Vague Evidence of Past Misconduct Unrelated to the Defendant

A second error by the trial court also resulted in a fundamentally unfair proceeding, depriving petitioner of due process. During the trial on punitive damages, the court permitted a plaintiff's expert witness to assert that over 1,000 accidents between automobiles and trains occur annually nationwide, and that a large number of those accidents had occurred under circumstances similar to the accident in this case. 715 N.E.2d at 551-52. Significantly, this opened the door for the jury improperly to punish petitioner for acts committed by other parties. Such evidence should not have been admitted, as it is axiomatic that a state may not exact punishment on a party for acts committed by others. *See Enmund v. Florida*, 458 U.S. 782, 798 (1982).

Urging the jury to deliver substantial punitive damages, the plaintiff in closing argument specifically called the

jury's attention to plaintiff's expert's testimony that many accidents have occurred under similar circumstances. While evidence of prior misconduct may be relevant for the purpose of determining reprehensibility of the conduct, *Gore*, 517 U.S. at 574, n.21 ("repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577), not only was no testimony offered about the particulars of any other "substantially similar" accidents, no evidence was offered that any of these other accidents either involved petitioner or were known to petitioner. In essence, plaintiff was asking the jury to punish petitioner for the alleged "sins" of the entire railroad industry. This violation of the constitutional principle of fundamental fairness was made possible by the court's erroneous evidentiary ruling.

Historically, the vast majority of crossing accidents have not involved petitioner. For example, in 1989, the year of the accident in this case, less than ten percent of crossing accidents *of all kinds* nationwide involved Conrail.[21] Clearly, general testimony about past crossing accidents, while highly prejudicial, may have little to say about petitioner's past conduct. Certainly, such testimony sheds absolutely no light on whether petitioner was ever involved in an accident occurring under circumstances similar to this case. By allowing such testimony, without any regard to where or how the prior accidents occurred, whether they involved petitioner and, if so, whether they bore any similarity to this case, the court relieved plaintiff's expert of any obligation to limit his testimony to that which was relevant to the issue of punitive damages. Had the jury been presented with specific evidence of similar past accidents involving petitioner, at least peti-

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21 Federal Highway Administration, *Rail-Highway Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1989* at 10 (1990) (Table 7A).

tioner would have been in a position to attempt to rebut such evidence or argue why its past conduct did not warrant substantial punitive damages in this case.

The trial court's erroneous ruling, enabling the plaintiff to introduce evidence of a general nature, with no connection to the defendant or the defendant's conduct, subjected petitioner to a judgment without notice, in violation of the Due Process Clause. Taking a cue from the plaintiff's successful strategy here, plaintiffs in future railroad crossing and other accident cases will be tempted to implore the jury to punish the defendant for the acts of others, and will offer evidence of alleged misconduct of the entire industry. Without proper guidance from this Court, future defendants will run the risk of being held accountable, and punished, for acts they did not commit.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for a writ of *certiorari*.

Respectfully submitted,

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(4)

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No. 99-950

IN THE

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CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Individually and as Administratrix of the Estate of MICHELLE L. WIGHTMAN, Deceased, and MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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STATEMENT OF THE CASE

Petitioner, Consolidated Rail Corporation ("Conrail"), claims it was denied due process by a punitive award "imposed in a vacuum." Some vacuum. More than ten years ago, two young women died when a Conrail train struck a car at a multi-track, mainline crossing in Sandusky, Ohio after Conrail ignored an explicit police warning that a train standing near the crossing created a danger of a train-car collision. In 1990, a jury found punitive damages should be assessed, and Ohio's Sixth District Court of Appeals upheld the verdict on the basis "there was clear and convincing evidence . . . [of] . . . malice on the part of Conrail." *Wightman v. Consol. Rail Corp.* 94 Ohio App. 3d 389, 408, 640 N.E.2d 1160 (1994), Respondents' Appendix ("Resp. App.") 29a. The Ohio Supreme Court declined to hear the matter.[1]

A second jury, in 1996, assessed punitives at $25,000,000. Conrail sought a remittitur, claiming constitutional excessiveness. The trial court carefully analyzed the evidence in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) and concluded the verdict was not excessive. Nevertheless, it granted Conrail a $10,000,000 remittitur and relief from interest on the judgment. Petitioner's Appendix ("Pet. App.") 64a.

1. Ohio law at the time of the first trial required the jury to determine whether punitive damages should be assessed, after which the judge was to determine the amount. The appellate court found that the trial court, by failing to award punitive damages after the jury's findings, had not complied with the Ohio statute. Resp. App. 29a. After remand, the Ohio Supreme Court ruled litigants are constitutionally entitled to a jury trial on punitive damages. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994). Therefore, the amount of punitives in *Wightman* became a jury issue.

After the appellate court rejected appeals by both parties, the Ohio Supreme Court heard the Wightmans' appeal and Conrail's cross-appeal. It upheld the appellate court's finding that the remitted punitive award was not constitutionally excessive and also affirmed the lower court's decision on evidentiary issues raised by Conrail's cross-appeal. The court reversed the grant of interest relief to Conrail on statutory grounds. Pet. App. 8a-12a.

Two months after oral arguments in the Ohio Supreme Court, Conrail sought to recuse Justices Pfeifer and Sweeney under Canon 3(G)(1) of the Ohio Code of Judicial Conduct on the ground the "appearance of impropriety" had been created because the law firm representing the Wightmans, and relatives of the firm's partners, had made admittedly lawful contributions to the 1998 reelection campaigns of these justices. Pet. App. 76a. This motion raised no federal due process issue, was procedurally improper, and was contrary to Ohio law requiring recusal motions to be filed on a timely basis.

On December 6, 1999, Conrail filed its Petition for a Writ in this Court. Because Petitioner has failed to mention significant parts of the record, correction and clarification are necessary.

A. The Train-Car Collision

On a February evening in 1989, a westbound Conrail train stopped for minor repairs on a double track mainline about 200 feet east of a grade crossing in Sandusky, Ohio, creating a severe obstruction to the ability of southbound motorists to see past the standing train. The train crew knew:

1) the stopped train blocked the ability of southbound motorists to see westbound trains approaching the crossing;

2) high speed, westbound trains were due;

3) heavy Saturday night traffic was proceeding over the crossing; and

4) the gates and lights could not positively signal the approach of another train because they had been disabled by the stopped train from doing so.

Pet. App. 59a.

The conductor immediately recognized the danger but, he explained, rather than implement available measures to prevent a crash, his "only option" under Conrail's operating procedures was to have the crew make the minor repairs necessary to get the train moving again. About 20 minutes prior to the collision, a police officer arrived, saw there was a possibility of a collision, and immediately requested his dispatcher to notify the railroad. Minutes later, the officer was advised by radio Conrail had been notified of the danger, and he left. Conrail ignored the warning. Although the train was stopped for about an hour, the railroad, following a longstanding operating practice, took no measures to prevent a collision. Pet. App. 51a, 60a-61a.

Fifteen minutes after the police warning, Michelle Wightman, operating her mother's 1985 Ford, approached from the north in a stream of southbound traffic. As she drove onto the crossing at about 5 mph and attempted to see past

the standing train, the obstruction was so severe the car was already in harm's way when a 60 mph freight train suddenly emerged. According to witnesses, the occupants of the car "didn't have a chance."[2] Pet. App. 51a and Resp. App. 32a-34a.

The Wightmans showed how a train standing near a mainline crossing, combined with a system disabled from signaling the approach of a second train, creates a great danger of a crash — a fact known for 30 years in the railroad industry. According to a retired railroad engineer with 43 years experience, about 99% of drivers proceed over the crossing under these conditions. The engineer of the stopped train, who had a clear view of the crossing throughout the period prior to the crash, did not observe a single car turn around. The Wightmans also showed how, without slowing railroad operations, various measures could easily have eliminated the possibility of a collision. Although Conrail's dispatcher and the engineer had continuing radio communications, and both knew high speed trains were due, neither did anything to protect against a collision. According to Dr. William Berg, a civil engineer with a special expertise in grade crossing safety, many collisions happen under conditions "substantially similar" to those at the Sandusky crossing. Pet. App. 39a.

Notwithstanding the six-year lapse between trials, the conductor of the stopped train testified in the second trial that he had not been instructed by Conrail in the interval to do anything differently, if he encountered the same situation. One of Conrail's middle managers conceded that

2. Resp. App. 36a depicts a model used by witnesses to show the position of trains and the Wightman vehicle moments before the collision.

unscheduled stops for minor repairs, like that near the Sandusky crossing, is "the type of thing . . . [that] . . could occur at so many locations" in Conrail's system. Pet. App. 59a-63a; Resp. App. 35a. As in the first trial, Conrail offered no explanation for ignoring an explicit police warning at least 15 minutes prior to the collision.

B. The Ohio Supreme Court's Decision

After meticulously applying the due process framework in *BMW v. Gore*, the court concluded the remitted punitive award of $15,000,000 was not excessive and "did not violate Conrail's due process rights." *Wightman v. Consol. Rail Corp.*, 86 Ohio St. 3d at 439, 715 N.E.2d 546 (1999), Pet. App. 19a. In view of Petitioner's challenge to the impartiality of Justices Pfeifer and Sweeney, it is important to note it was the Wightmans who first appealed the rulings of Ohio's Sixth District Court of Appeals and that Justices Pfeifer and Sweeney ruled against them on the main issue raised by their appeal, namely, whether it was an abuse of discretion by the trial court to grant a $10,000,000 remittitur, without a finding of excessiveness. Since two of the justices agreed with the Wightmans on this point, had Justices Pfeifer and Sweeney not voted as they did, Conrail might well face a $25,000,000 punitive award, plus interest — a liability nearly double that under the rulings supported by Justices Pfeifer and Sweeney as part of the majority. On this score, it seems Conrail will not take "yes" for an answer.

SUMMARY OF ARGUMENT

Petitioner has plainly failed to present any proper basis for a writ. First, the decisions below reflect a deep respect for the notion of due process expressed in *BMW v. Gore*. At

each stage, the Ohio courts reviewed the record with arduous attention to the due process considerations embodied in *BMW*. The decision of the Ohio Supreme Court, in particular, accorded to Conrail precisely the kind of reasoned and balanced analysis required by the three guideposts in *BMW*. Although three justices of the Ohio Supreme Court dissented in part with respect to some rulings below, none did so on the basis the remitted punitive award was excessive under the guidelines set forth in *BMW*. The upshot is, one trial judge, three appellate judges, and seven justices of the Ohio Supreme Court concluded the punitive award was not unconstitutionally excessive.[3]

Contrary to petitioner's assertion, there is no conflict among the lower courts as to the application of the proportionality analysis in *BMW*. Nor does the record support Conrail's attempt to bootstrap an ordinary discretionary evidentiary ruling of a state court into a deprivation of due process.

Finally, Conrail's attempt to use admittedly lawful campaign contributions to raise a due process issue for the first time in this Court disregards this Court's jurisprudence regarding when a federal question may properly be raised here.

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3. One of the justices believed the award was based on wrongful death as well as property damage, and thus was excessive under Ohio law.

REASONS FOR DENYING THE WRIT

I. THE PUNITIVE AWARD BELOW FULLY CONFORMS WITH *BMW v. GORE*

The Ohio Supreme Court noted that the *BMW* court described the degree of reprehensibility of defendant's conduct as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award . . . [and] . . . that BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." 517 U.S. at 575, 576. In its constitutional analysis, the Ohio Supreme Court applied this criterion of reasonableness as follows:

> It is with this guidepost, the most important one, that this case distinguishes itself the most from BMW. Ineffective gates at a railroad crossing are of a completely different character than a painted-over scratch on a luxury automobile. Literally and figuratively, we are dealing with the difference between a scratch and a cataclysm — the difference between a practice that might affect the value of an automobile by ten percent, and a practice that could result in massive property damage, physical injuries, and untold psychological pain. Conrail evinced a disregard of the danger it posed to the health and safety of motorists.
>
> In this case, Conrail employees did nothing to warn drivers of oncoming trains, despite the fact that they saw vehicles crossing the track by driving around the gates. Even after a phone call from police, Conrail did not take preventative

> measures to avert an accident. According to the trial judge, this tragic case has done little to persuade Conrail to change, citing Conrail's "corporate attitude which clearly fails to recognize that the extremely dangerous practice which produced the catastrophic collision needs to be changed."
>
> We find that Conrail's conduct reaches the level of reprehensibility sufficient to warrant the substantial punitive damages award the jury imposed in this case.

Pet. App. 16a.

It is significant that the trial court, in reviewing the record, made the following statement regarding Conrail's attitude toward public safety at its grade crossings:

> The Court . . . feels compelled, as a matter of public safety, to do everything in its power to insure . . . Conrail promptly changes the practice which produced this unnecessary tragedy. After much reflection, the Court has concluded that the most effective way to deter Conrail from continuing this practice is to limit the jury's verdict to an amount which will sufficiently punish Conrail and create a positive inducement to change its practices, rather than continue to challenge the findings of the earlier jury and the Court of Appeals.

Pet. App. 64a. The foregoing statement is a pointed reference to the fact that Conrail did nothing during the six-year interval between trials to correct the operating practice behind

this train/car collision. It is precisely this kind of conscious indifference for the rights and safety of others which this Court, in *BMW*, made the touchstone for determining reasonableness in cases where, as here, the defendant's conduct threatens the rights and safety of human beings.

As to the second indicium, the ratio of punitive damages to the actual harm inflicted on the plaintiff, the Court relied directly on the *BMW* analysis. The court pointed out that Ohio law, consistent with *BMW*, "has consistently rejected the notion of a bright-line mathematical formula for the computation of the reasonableness of punitive damage awards." It, therefore, concluded: "We see the ratio between compensatory and punitive damages as less relevant here because of the egregiousness of the act." Pet. App. 17a.

Finally, the court analyzes the third *BMW* indicium, namely, civil or criminal penalties that could be imposed for comparable misconduct:

> Conrail claims to have violated no Ohio statutes on the night of the accident. Conrail argues that even if it had not fully complied with all laws, the maximum federal penalty for the willful failure to comply with an order to remedy a violation of signal-system safety regulations that creates an imminent danger of death or injury is $22,000 per violation. Section 209.409, Title 49, C.F.R.
>
> But the *BMW* case and its civil penalties are a world away from this case. *BMW* requires that the penalties imposed be for comparable misconduct. In *BMW*, the $2,000 fine actually applied to the specific conduct of the defendant

> that was at issue. The $22,000 fine Conrail refers to does not apply to the specific conduct involved in this case. The $22,000 fine applies to the failure to comply with an order to remedy a violation of signal-system safety regulations. An order has to have been made and disregarded by the railroad company for the fine to be imposed. It is not a fine for causing a death.

Pet. App.18a. The court commented that Conrail's conduct here was so egregious it could constitute involuntary manslaughter under Ohio's criminal code and that "the applicable criminal and civil penalties available were comparable to the punitive damages award." Pet. App. 19a.

On the basis of the constitutional framework provided by *BMW v. Gore*, the Ohio Supreme Court concluded:

> In considering the three guideposts set forth by the court in *BMW*, we find that Conrail had fair notice of the conduct that would subject it to punishment as well as the severity of the possible punishment. The award in this case was not grossly excessive and did not violate Conrail's due process rights.

Pet. App. 19a.

II. NO CONFLICT EXISTS AMONG THE LOWER COURTS REGARDING THE PROPORTIONALITY ANALYSIS OF THE SECOND GUIDEPOST IN *BMW v. GORE*.

In *BMW v. Gore*, one of the three "guideposts" for ascertaining whether the size of a punitive award is unconstitutionally excessive is whether there is a reasonable relationship between punitives and the harm caused by the defendant's conduct. *Id.* at 581. Petitioner states that "the lower courts are in conflict on how to apply the second guidepost" and argues the states will continue to be "perplexed" and "confounded" by this issue until this Court intervenes to "provide much-needed guidance." Petition at 2, 10, 20. The claimed conflict Conrail points to is an alleged split among the lower courts as to whether, in assessing proportionality between the punitive and compensatory awards, a court may consider harm for which the state does not permit a recovery of punitive damages. Specifically, Conrail contends the *Wightman* court considered the wrongful death of Michelle Wightman, in addition to the property damage, in assessing the extent of the potential harm engendered by Conrail's dangerous operating practices. Conrail urges this Court to resolve this "conflict" by rejecting the approach of those lower courts, with whom Ohio's high court is allegedly arrayed, that evaluate punitive damages by considering "all of the damages awarded to a plaintiff, including amounts awarded for claims that would not themselves be subject to punitive damages." Petition at 23. However, as we will show: (1) there is no conflict in interpretation; (2) the Ohio Supreme Court strictly complied with the teachings of *BMW*; and (3) the punitives were not unconstitutionally excessive.

Conrail cites *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 923 P.2d 456 (1996), to support its assertion there is a conflict as to an important federal question. Conrail suggests the Idaho and Ohio Supreme Courts are the only state courts of last resort that incorporate into their proportionality analysis damages that do not support a punitive award under state law.[4] However, petitioner has misunderstood Idaho law. Conrail relies on *Walston* for the proposition that Idaho takes into consideration the harm caused by a breach of contract in assessing the excessiveness of a punitive award, with the suggestion a breach of contract will not support an award of punitives. Idaho, however, is one of the states that actually *permits* an award of punitives for breach of contract, at least where the breach is malicious and conducted with total disregard for the interests of the other party. *See, e.g., Cuddy Mountain Concrete Inc. v. Citadel Constr., Inc.*, 121 Idaho 220, 824 P.2d 151 (Ct. App. 1992). As such, Idaho falls into line with the teachings of the other cases cited by Conrail.

As to Ohio, it is clear, contrary to Conrail's assertion, the *Wightman* court did *not* factor wrongful death into its proportionality analysis:

> The injury here was catastrophic and could have been financially more so. We are not persuaded that if Michelle Wightman had been driving a

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4. Conrail also cites *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996). A review of that decision, moreover, does not disclose that the federal district court considered conduct for which no punitives could be awarded in its assessment of proportionality. In any event, only conflicts between or among the federal circuit courts of appeal or among the states' highest courts should merit a writ.

> $40,000 BMW that would make a more acceptable ratio. An expensive car does not make the award more legitimate. The award stands on its own. This case offers one of those particular instances where a particularly egregious act has resulted in a small amount of economic damages.

Pet. App. 17a. This statement reflects a keen awareness of the difference between Wightman's economic damages and the damages based on her wrongful death claim. Accordingly, Petitioner fails to establish a conflict as to how this Court's proportionality guidepost is being interpreted by the lower courts.

Conrail also asserts, regardless of any conflict, the punitives in *Wightman* violate *BMW* criteria because the ratio of the punitive damages awarded is disproportionate to the actual damages. Petitioner again misstates the law. This Court has made clear the proper ratio analysis is to ascertain "whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred." *BMW*, *supra*, at 581, citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993). (Emphasis in original.) Thus, where the potential for great harm is substantial, "even low compensatory damages may support a higher ratio than high compensatory damages." *BMW* at 831. In *BMW*, unlike the instant case, substantial potential harm was not an issue. As this Court observed, "there is no suggestion that Gore or any other BMW purchaser was threatened with additional potential harm." *Id.* at 830. Pivotal to that analysis was the fact the harm engendered by BMW's corporate decision to repaint luxury

automobiles was, *ipso facto*, limited to a decrease in the economic value of the car; no additional harm was threatened.

Conrail also suggests the Court revert to the mindless application of a mathematical litmus test to determine the constitutionality of a punitive award by comparing the ratios of punitive to actual damages in various cases. ("[T]he punitive damages award in this case cannot stand, as a ratio of 6,250 to 1 is drastically greater than the ratio found constitutionally deficient in *Gore*." Petition at 24.) Conrail neglects to mention this is an approach "consistently rejected" by this Court. *BMW* at 582. As the Ohio Supreme Court points out, the harmful nature of Conrail's conduct would not change if, instead of having destroyed a used Ford Tempo, it had demolished a BMW worth $40,000. Pet. App. 12a, 17a. Presumably, the ratio in the latter instance would be more acceptable to Conrail, being 325 to 1. Thus, as this Court did in *BMW*, the Ohio court recognized the absurdity of using an arbitrary ratio as determinative in cases where, as here, the defendant's conduct consciously disregards the lives and safety of people.

III. THERE IS NO DUE PROCESS ISSUE ARISING FROM THE TRIAL COURT'S DISCRETIONARY EVIDENTIARY RULINGS.

Conrail claims it was denied a fair trial because of evidentiary rulings. According to Conrail, the trial court prevented it from presenting expert testimony regarding the facts and circumstances surrounding the collision and from showing that Michelle Wightman "had consumed several alcoholic beverages on the night in question." Petition at 4, 18. The truth is Conrail had the opportunity to present more evidence in the second trial than it had offered in the

first, had it chosen to do so. Although the railroad did not designate an expert reconstructionist in the first trial, it did so in the second and the record is crystal clear the only reason Conrail did not call its designated reconstructionist to testify is it chose not to do so.[5]

Furthermore, Conrail's assertion in this court that Michelle Wightman "consumed several alcoholic beverages" is pure invention. The only evidence regarding alcohol consumption was that a witness had seen Michelle taking two sips of wine cooler and that she had a blood alcohol

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5. During the trial, this occurred:

> *Wightmans' counsel*: . . . you're going to bring in a reconstructionist. Yesterday you introduced the fact, you suggested that you could see the headlights.
>
> *Conrail's counsel*: I'm not — who said I'm bringing in a reconstructionist?
>
> *Wightmans' counsel*: You said in your opening statement that you could see the headlight and you're suggesting for something like twelve seconds . . .
>
> *Conrail's counsel*: Am I going to be allowed to bring in that person here to show that Judge?
>
> *Wightmans' counsel*: I would think if he can show that she could see the headlight for twelve seconds, of course, he should be able to bring . . .
>
> *The Court*: Sure. He didn't have a problem with that. So I will let you do that.

Resp. App. 34a-35a.

level of one-third the legal limit. Resp. App. 39a-45a. The Ohio Supreme Court upheld the appellate court's ruling that the trial court had not abused its discretion by excluding evidence "showing Michelle Wightman had consumed a small amount of alcohol prior to the conclusion . . ." Pet. App. 9a.

Under Ohio law, a trial court's exclusion of evidence can be reversed only upon a showing of a clear abuse of discretion that materially prejudiced the objecting party. *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248 (1985); *Reitz v. Howlett*, 106 Ohio App. 3d 409, 666 N.E.2d 296 (9th Dist. Summit Cty. 1995). Conrail's arguments regarding the exclusion of evidence, therefore, are but an attempt to bootstrap proper discretionary rulings into errors of constitutional dimensions. These evidentiary rulings, moreover, are different in kind from those described in the cases cited by Conrail where criminal defendants were precluded from introducing critical exculpatory evidence due to a mechanistic application of the state's evidentiary rules. Indeed, the cases cited by Conrail underscore this Court's "reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts." *Crane v. Kentucky*, 476 U.S. 683 (1986).

IV. PETITIONER'S RECUSAL MOTION RAISED NO FEDERAL DUE PROCESS ISSUE AND VIOLATED OHIO PROCEDURAL AND SUBSTANTIVE LAW GOVERNING SUCH A MOTION

Petitioner invites this Court to determine the "fairness of Ohio's system of electing judges and financing their campaigns" because of contributions to the reelection

campaigns of Justices Pfeifer and Sweeney by members of the firm representing Darlene Wightman and family members of its partners which, says Conrail, compromised its due process right to an impartial appellate review. This assertion is devoid of merit on several grounds.[6]

A. Petitioner Did Not Raise a Due Process Issue Below Regarding the Campaign Contributions to Justices Pfeifer and Sweeney.

Petitioner for the first time raises a federal question here. Specifically, it claims an infringement of due process "because large financial contributions to a judge from a lawyer with a case pending before the judge certainly create the appearance of a *quid pro quo*." *Id.* at 12-13. Conrail's motion below, however, relied solely upon alleged violations of Ohio Code of Judicial Conduct which, as this Court has made clear, cannot give rise to a matter reviewable in this Court. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590

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6. Prior to the second trial and while the issue of a litigant's constitutional right to a trial by jury on punitives was pending in the Ohio Supreme Court, Conrail requested Judge Ann B. Maschari, who presided at the first trial, to apply the very statute whose constitutionality was under review, and to set the amount of damages herself. When she refused this request, Conrail filed a motion asking Judge Maschari to recuse herself from further participation in the case, which she did. Resp. App. 46a-47a. The case was assigned to the Honorable Joseph Cirigliano who, as noted above, reduced the award by $10,000,000 and granted Conrail interest relief. Conrail's recusal motion, therefore, challenged the impartiality of two justices who had voted to uphold the remittitur granted Conrail by Judge Cirigliano. In short, this Petition is about Conrail's unhappiness with the size of an already remitted punitive award that might well have been much larger had Justices Pfeifer and Sweeney agreed with the Wightmans' contention the remittitur was improper under Ohio law.

(1875). Petitioner has thus failed to meet its burden of showing it properly presented a federal claim to the Ohio Supreme Court and, therefore, there is no basis for a writ. As this Court observed in *Adams v. Robertson*, 520 U.S. 83 (1997), "it would be unseemly to our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have the occasion to consider." *Id.* at 210, citing *Webb v. Webb*, 451 U.S. 493, 500 (1981).

Moreover, this Court has clearly stated most matters relating to judicial qualification do not rise to a constitutional level. The balancing of such factors as kinship, personal bias, state policy, and remoteness of interest are generally left to legislative discretion. *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). Indeed, even where bias or prejudice exists, and even where there is a failure to adhere to the local code of judicial conduct, such infirmities alone do not constitute a violation of due process. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

Moreover, in an effort to force this case into a constitutional framework, Conrail focuses on language in various opinions holding that a litigant need not show a judge's decision was actually influenced by a personal interest in the case. Conrail, however, ignores the required predicate before issues of bias arise; in each of the cases cited, there was the requisite direct interest in the outcome. *See, e.g., Lavoie, supra* (The judge's opinion had the clear and immediate effect of enhancing both the legal status and settlement value of his own case); *Tumey, supra* (The mayor who presided over the case was personally and financially interested in the decision, for under state law at the time, he would receive no fee unless he found the defendant guilty);

Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (The fees produced from the mayor's court accounted for a substantial portion of municipal revenues); *In re Murchison*, 349 U.S. 133 (1955) (A judge serving as a "one-man grand jury" in investigating a crime cannot later preside over a contempt hearing for actions that took place during the grand jury proceedings). Tellingly, Conrail cites no case where a judge was disqualified for the receipt of lawful campaign contributions.

As noted by the authorities cited in Conrail's brief, the states have addressed the appropriate balance to be struck between the interests of full participation by attorneys in the election process with the need to ensure judges are insulated from potential for bias. Most commentators, including those cited by Conrail, suggest striking that balance by limiting the amount and specifying the timing of financial contributions. *See, e.g.*, Stuart Banner, Note, *Disqualifying Elected Judges From Cases Involving Campaign Contributors*, 40 Stan. L. Rev. 449 (1988); Mark Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum*, 86 Mich. L. Rev. 382 (1989); Jason Levien & Stacie L. Falka *Cleaning Up Judicial Elections*, 2 Mich. L. & Pol'y Rev. 71 (1997). This is exactly the balance struck by Ohio in its adoption of Canon 7 of the Ohio Judicial Code. Ohio has enacted limitations both upon the amount of contributions to election campaigns of Supreme Court justices and the period within which those donations may be solicited. These limitations, among the most restrictive in the nation, were strictly complied with by Justices Pfeifer and Sweeney.

B. Petitioner's Recusal Application Was Dilatory

Under Ohio law, a party who fails to act promptly in seeking to recuse a judge will be deemed to have waived his or her objections, except in "extraordinary circumstances." *In re: Disqualification of Light*, 36 Ohio St.3d 604, 522 N.E.2d 458 (1988). Petitioner attempts to gloss over this requirement by asserting "after the oral argument, Conrail obtained the final post-election campaign finance reports of two justices of the Supreme Court . . . both of whom had been reelected just prior to the November, 1998 argument," Petition at 7, 8. This implies the campaign finance reports were not public knowledge, until *after* oral arguments. The truth, however, is all Murray contributions were first publicly reported on April 23, 1998, one month prior to the date on which Conrail filed its first brief on the merits and nearly seven months prior to oral arguments. Petitioner offers no explanation for this delay or, for that matter, how it manages to find an appearance of impartiality by two justices who affirmed a $10,000,000 remittitur to a verdict the trial court found was not constitutionally excessive. Thus, because Conrail has failed to establish that its federal claim was presented to the Ohio court in a timely and proper manner, its application for a writ should be denied.

C. Conrail's Motion Below Was Procedurally Improper and Extra-Legal in Nature.

Conrail's motion below did more than seek the recusal of two justices. Under the heading "background," Petitioner sets forth what amounts to a "Statement of the Case" from Conrail's point of view, including numerous factual contentions of no relevance to the subject matter of the motion. Such a filing, nearly two months after presentation

of oral arguments, was entirely improper and raises the inference Conrail was using this motion to influence the Court on the merits. This impropriety rendered the motion extra-legal and, therefore, it is unfair to criticize the Ohio Supreme Court for not formally responding to it. This can fairly be seen as an abuse of the judicial process that was, in a fundamental sense, an attack on the very procedures that undergird our notion of due process.

D. Petitioner's Representation of Its Motion Below is Substantially Misleading

It is one thing to lay out facts, quite another to use characterizations that have no factual basis. The petition repeatedly uses terms such as "questionable contributions," "ethical questions," and "issue of impropriety" to insinuate something for which there is simply no basis. These invidious characterizations are used to support an argument regarding Canon 7 of the Ohio Code of Judicial Conduct for which there is no authority, namely, the notion that contributions by different individuals can be aggregated to create both an ethical violation and due process issue. The Murray firm consists of nine partners, whose families span three generations and consist of nearly 100 people. Because of the nature of this firm's practice, there has probably not been a time in the past 15 years when the Murray firm has not had at least one major case pending in the Ohio Supreme Court.[7] Throughout that period, the law firm has openly exercised

7. Resp. App. 37a is a list of cases, most of which are published in the 2000 edition of *Martindale-Hubbell*, in which the Murray firm was either lead counsel for a litigant or *amicus curiae* in the Ohio Supreme Court in the past two decades. This list does not include many more cases in which the Murray firm petitioned the Ohio Supreme Court for a discretionary review.

its right to support judicial candidates of its choice, within the bounds of Ohio's campaign rules. There has never been the slightest suggestion of any impropriety against the firm or its members. Conrail's position, therefore, necessarily leads to the conclusion, unless all firms are ethically bound to impose limitations on the number of partners who may support the candidate of his or her choice, the Murray partners, not to mention family members, are precluded from contributing solely by virtue of their relation by blood — a proposition tantamount to a Bill of Attainder.

Conrail also implies a connection between the campaign contributions and the Murray firm's "stake" in the outcome of the case. This, says Petitioner, makes its right to a fair trial "more acute" because the plaintiff's law firm has "millions of dollars in fees at stake in the outcome of a pending appeal." Petition at 13. This is a highly misleading assertion. For one thing, Darlene Wightman has assigned fifty percent of the punitive damages recovered to the Wightman Charitable Foundation. The Murray firm, therefore, will receive much less than one-third of the punitive award for ten years of work to hold Conrail accountable for conduct shown to be consciously disregardful of the lives and safety of people for decades.

Conrail also asserts the Ohio Supreme Court "for the first time ruled that post-judgment interest could run on punitive damages, thereby increasing the already excessive penalty by approximately one-third, or by more than $5,000,000." Petition at 15. This implies a connection between the post-judgment interest ruling and the contributions. Conrail, however, fails to mention that this ruling was based upon unambiguous language in Ohio's post-judgment interest statute, a reading that was concurred in by all seven justices.

CONCLUSION

For the reasons set forth, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF OHIO, ERIE COUNTY DATED AND DECIDED APRIL 15, 1994

WIGHTMAN, Admr., et al.,

Appellees and Cross-Appellants,

v.

CONSOLIDATED RAIL CORPORATION et al.,

Appellants and Cross-Appellees.*

Court of Appeals of Ohio,
Erie County.

No. E-92-75.

Decided April 15, 1994.

* * *

ABOOD, Presiding Judge.

This is an appeal and cross-appeal from a judgment of the Erie County Court of Common Pleas which, following a jury trial, awarded $1,000,000, the amount of the jury verdict, in compensatory damages to the estate of Michelle Wightman.

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* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1994), 70 Ohio St.3d 1442, 638 N.E.2d 1044.

Appendix A

Defendant-appellant Consolidated Rail Corporation ("CRC") sets forth the following assignments of error:

"I. The trial court erred in failing to direct a verdict in appellant's favor at the close of all the evidence, finding the negligence of plaintiff's decedent was the sole proximate cause of the accident at issue.

"II. The trial court erred and denied appellant a fair trial as a matter of law in connection with the jury charge as follows:

"1. In refusing to instruct and submit appellant's interrogatory to the jury regarding the willful and wanton misconduct of the decedent and in giving a punitive damage charge as to appellant;

"2. In failing to instruct and submit appellant's interrogatory to the jury concerning the intervening and superceding acts of the City of Sandusky Police Department;

"3. By instructing the jury in a contradictory and confusing manner and in providing erroneous instructions of law;

"4. By failing to submit required verdict forms to the jury; and

"5. In other instructional errors manifested in the record.

"III. The trial court erred and denied appellant a fair trial in the admission of evidence as follows:

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"1. By admitting over objection expert's opinions inadmissible under Rules of Evidence 701 through 705;

"2. By admitting over objection testimony of plaintiff's witnesses on matters of law and on facts not of record;

"3. In permitting plaintiff's witnesses to testify over objection as to the private, inter-company rule of defendant.

"IV. Other errors at law occurring at time [of] trial and brought to the attention of the trial court by the appellant."

Plaintiffs-appellees, Darlene M. Wightman, administrator of the estate of Michelle L. Wightman, deceased, and Darlene M. Wightman, individually, set forth the following assignments of error on cross-appeal:

"I. The trial court erred by refusing to submit the issue of punitive damages to the jury on Darlene Wightman's property damage claim.

"II. The trial court erred in refusing to award punitive damages, attorneys fees, and costs to Darlene Wightman.

"III. The trial court erred in refusing to order Conrail to pay interest at the statutory rate on one million dollars from the date of the jury's verdict or, in the alternative, for each day entry of judgment has been delayed as a result of defendants' motion to disqualify."

The facts that are relevant to the issues raised on appeal are as follows. On February 19, 1989, at approximately 12:05

a.m., the decedent, Michelle Wightman, was driving her mother's 1985 Ford southwest on Remington Avenue approaching a railroad crossing in the city of Sandusky. A short distance to the east of the crossing, a train owned and operated by CRC was stopped for repairs on the tracks closest to Michelle. When she got to the crossing, the gates were down and the red lights were flashing. Michelle proceeded to drive around the gates and began to cross the railroad tracks when another train owned by CRC that was traveling westbound on a second set of tracks appeared from behind the stopped train and struck Michelle's car, killing her and her passenger instantly.

On September 12, 1989, Michelle's mother, appellee Darlene Wightman, acting both in her capacity as administrator of Michelle's estate and individually, brought suit against CRC and the train's engineer, appellant Louis Nelson. The complaint set forth two causes of action. The first cause of action contained four counts. Count one set forth a claim for wrongful death which alleged: (1) that CRC was negligent in permitting the stopped train to stand in such close proximity to the crossing and obstruct the ability of motorists to observe a second train approaching without taking reasonable precautions to protect motorists; (2) that CRC was negligent in operating a train at a speed which created a foreseeable risk of injury or death; (3) that CRC was negligent in failing to train and advise its crews as to what reasonable measures should be taken in such circumstances to protect motorists; and (4) that Nelson was negligent in failing to reduce the speed of his train as he approached the crossing, in failing to notify the crew of the disabled train that he was approaching the crossing at such a

high rate of speed and in failing to give adequate warning to motorists that his train was approaching the crossing.[1]

Count two of the first cause of action set forth a survivorship claim.[2] Count three of the first cause of action set forth a claim for funeral and burial expenses.[3]

In count four of the first cause of action, appellees alleged: (1) that CRC had habitually permitted similar circumstances to exist at various points in its system which has resulted in numerous deaths and injuries; (2) that CRC failed to take reasonable steps to protect motorists at the crossing, despite the fact that it had actual knowledge for approximately one hour prior to the decedent's death, that a situation existed in which harm was certain or substantially certain to occur; and (3) that these acts and omissions constitute an intentional, wanton and reckless disregard for human life and the safety of the public, which conduct bars appellants from avoiding liability in this action because of any alleged acts or omissions on the part of the decedent. For their first cause of action appellees requested a minimum of $79,500 in compensatory damages.

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1. Although there is no judgment entry in the record which dismissed Nelson, at the conclusion of the evidence the parties stipulated that Nelson could be dismissed from the case.

2. There is no judgment entry in the record which dismissed this claim, however, it does not appear that it was pursued at trial since the evidence did not support such a claim.

3. There is no judgment entry in the record as to any disposition on this claim.

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The complaint's second cause of action set forth Darlene Wightman's personal claim for property damage, for the loss of her automobile as a result of appellants' negligence and "intentional, wanton and reckless misconduct." For this cause of action, appellee Darlene Wightman requested compensatory damages in excess of $1,000 and as well as punitive damages in excess of $25,000.

On December 18, 1989, appellants filed their answer and on October 3, 1990, appellees filed an amended complaint which amended their requests for compensatory and punitive damages. On October 16, 1990, the case proceeded to trial by jury. At the conclusion of appellees' case, appellants moved for a directed verdict, which the trial court denied. At the conclusion of all of the evidence, the court denied both appellants' renewed motion for a directed verdict and appellees' motion for directed verdict. The case was then submitted to the jury with eight interrogatories.

On October 30, 1990, the jury entered a verdict in favor of the estate of the decedent in the amount of $1,000,000. By its response to the interrogatories, the jury: (1) found that the $1,000,000, exclusive of funeral and burial expenses, would compensate the estate of the decedent without regard to the negligence of either party; (2) apportioned the negligence of the parties to the accident as sixty percent to appellant CRC and forty percent to the decedent; (3) found that appellant CRC "authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrated 'malice' * * * and that such malice was, by clear and convincing evidence a proximate cause of the accident"; and (4) found that appellant CRC should be liable for punitive damages.

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On October 31, 1990, the court filed its judgment entry which set a hearing on the punitive damages for November 3, 1990. On November 13, 1990, before the proceedings on punitive damages were concluded, appellants' attorney filed an affidavit of bias or prejudice against the trial judge in the Supreme Court of Ohio. Because of this filing, the trial court stayed further proceedings on the case pending determination of the issue of disqualification. On February 11, 1991, the affidavit of disqualification was found not well taken. On May 20, 1991, the trial court filed its judgment entry which set a further hearing on the punitive damages for June 14, 1991. After further continuances, the hearing on punitive damages was ultimately held on August 9 and September 20, 1991.

Prior to that hearing taking place, however, on June 10, 1991, CRC filed a motion for judgment notwithstanding the verdict as to the punitive damage award. In support of its motion, CRC argued that: (1) punitive damages are not recoverable in a wrongful death case and therefore punitive damages could only be awarded as to Darlene Wightman's property damage claim; (2) Wightman could only prevail on her claim for compensatory damages if the jury determined that CRC's negligence exceeded Michelle Wightman's; (3) since the trial court refused to charge the jury on CRC's defense of comparative negligence and the jury never considered that issue, no judgment can be properly entered on her property damage claim and, therefore, the punitive damage award was not proper; (4) punitive damages cannot be awarded on Darlene Wightman's claim since no verdict was ever entered in her favor; (5) while the parties did stipulate as to the amount of compensatory damages to

which Darlene would be entitled upon a finding of liability, there was no stipulation as to liability on that claim; (6) there is no evidence in the record from which the jury could properly have found that CRC acted with malice and, therefore, the punitive damage award was not proper; and (7) that the award of punitive damages is unconstitutional since it violated the Due Process and Excessive Fines Clauses of the United States Constitution.

On November 21, 1991, appellants filed a "post-trial consolidated brief and motion for new trial." In this brief, appellants set forth the issues in the case that remained to be resolved before the entry of final judgment, which included: (1) appellees' request for attorney fees, costs and interest on the award from the date of the verdict; (2) whether appellee Darlene Wightman was entitled to a punitive damage award since there was no judgment entry or verdict on her property damage claim; and (3) whether appellee Darlene Wightman was entitled to a punitive damage award based upon the amount of actual damages that she sustained. Appellants also requested a new trial in order to "prevent a manifest miscarriage of justice," primarily citing the issue of the decedent's comparative fault and the fact that the jury was not instructed that the decedent's conduct could have been found to be willful and wanton.

On February 11, 1992, the trial court filed a judgment entry in which it summarily denied CRC's motion for judgment notwithstanding the verdict without setting forth any reason for the denial. On November 10, 1992, the trial court filed a judgment entry in which it summarily denied appellants' motion for new trial, again without setting forth

any reasons. In that same entry the trial court entered judgment in favor of the estate of Michelle Wightman in the amount of the jury's verdict of $1,000,000 in compensatory damages, but awarded no punitive damages. The trial court noted on the judgment entry that there was no just cause for delay. Thereafter both parties filed a notice of appeal.

Before we address the parties' specific assignments of error, this court feels compelled to state that it has been difficult at best to consider the issues raised on appeal due to the failure of the trial court to set forth in its various judgment entries any basis for its denials of the parties' motions or the basis for its denial of punitive damages. This court and the parties have therefore been left to speculate as to the basis for the court's rulings. Our review of this case has been further complicated by the fact that not all of the claims and parties to this suit have been disposed of. Although the court did use the requisite Civ.R. 54(B) language, we fail to see why it did not dispose of the remaining claims.

I. APPEAL

A

In its first assignment of error appellant asserts that the trial court erred by failing to direct a verdict in its favor at the close of the evidence. In support of this assignment of error appellant argues that when the decedent proceeded around the gates and across the railroad tracks, she violated both state and municipal law governing motorists' conduct at railroad crossings, as well as a common-law duty to look

and listen, and such violations constituted negligence per se. Appellant also argues that the evidence demonstrates that the decedent intentionally violated these laws and the crossing warnings and that had she not done so the accident would not have occurred and, therefore, the sole cause of the accident was the decedent's own negligence.

Appellees respond that the cases of *Schellhouse v. Norfolk & W. Ry. Co.* (1991), 61 Ohio St.3d 520, 575 N.E.2d 453, and *Brown v. Consol. Rail Corp.* (Oct. 11, 1991), Erie App. No. E-90-35, unreported, 1991 WL 253917, are dispositive of this issue. Appellees submit that, pursuant to that authority, the jury's finding that appellant CRC acted with malice and that that malice was a proximate cause of the accident removes all issues of negligence from the case and, therefore, the trial court properly found that the decedent's estate was entitled to recover the full amount of the compensatory damages assessed by the jury.

Civ.R. 50(A)(4) provides that:

"When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

In considering a motion for a directed verdict, neither the weight of the evidence nor the credibility of the witnesses

is for the court's determination. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 429, 344 N.E.2d 334, 338. Where there is substantial evidence to support the position of the party against whom the motion is directed upon which reasonable minds may reach different conclusions, the motion must be denied. *Id.*

In *Schellhouse*, *supra*, the Supreme Court of Ohio determined that if a railroad committed an intentional tort with malice and if that intentional tort was a proximate cause of the plaintiff's damage, the negligence of the plaintiff's decedent is not a defense and the plaintiff would be entitled to full recovery. That court stated that "[a]cts committed with actual malice constitute behavior qualitatively different from that which may be characterized as merely negligent." *Id.*, 61 Ohio St.3d at 524, 575 N.E.2d at 456. The *Schellhouse* court noted that:

"Contributory negligence, prior to the enactment of R.C. 2315.19, did not bar recovery in an action predicated upon the willful, wanton or reckless conduct of a defendant. Likewise, the provisions of a statute which operate to prevent or reduce the recovery of a plaintiff due to her comparative negligence should not apply in such a case. Accordingly, in a civil action for tort or wrongful death, a finding by the jury that a plaintiff (or plaintiff's decedent) was comparatively negligent will not defeat or diminish the recovery of damages where the defendant's intentional tort, committed with actual malice, proximately caused the injury." *Id.*, 61 Ohio St.3d at 525, 575 N.E.2d at 457.

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In *Brown v. Consol. Rail Corp.* (Oct. 11, 1991), Erie App. No. E-90-35, unreported, 1991 WL 253917, this court, citing *Schellhouse, supra*, determined that a finding of actual malice negates a set-off for damages under Ohio's comparative negligence law.

Even if there had been no evidence presented to support a finding of malice, under the comparative negligence doctrine the fact that the decedent violated state and municipal traffic codes would not automatically establish that she was the proximate cause of the accident and would not preclude competent evidence as to appellant's own negligence. See *Kromenacker v. Blystone* (1987), 43 Ohio App.3d 126, 131, 539 N.E.2d 675, 680; *Case v. Norfolk & W. Ry. Co.* (1988), 59 Ohio App.3d 11, 570 N.E.2d 1132; *Brown, supra*.

In this case, to grant a directed verdict, the trial court, upon its review and assessment of the evidence would have had to conclude that reasonable minds could reach no other conclusion but that the decedent was negligent and that her negligence was the sole proximate cause of her death. Contrary to appellants' assertions, our review of the record indicates that there was evidence presented from which the jury could have reasonably concluded that appellant CRC acted with actual malice or at the very least acted negligently and that its actions were a proximate cause of the accident. We find, therefore, that the trial court did not err in denying appellant's motions for a directed verdict. Accordingly, appellant's first assignment of error is found not well taken.

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B

In its second assignment of error appellant asserts that it was denied a fair trial as a result of errors in the court's instructions to the jury. Appellant sets forth several specific areas in which it contends the trial court erred in its instructions: (1) in refusing to instruct the jury that the decedent's intentional violation of known duties could be found to constitute willful and wanton misconduct, and in refusing to submit an interrogatory to the jury on that issue; (2) by instructing the jury as to CRC's alleged intentional misconduct when the evidence did not warrant such an instruction; (3) in failing to charge the jury that the conduct of the Sandusky police officer could be found to be an intervening and superseding act relieving appellants of any liability and in failing to submit an interrogatory to the jury on this issue; (4) in giving jury instructions that were, in general, contradictory and confusing and erroneous as a matter of law; (5) in failing to charge the jury and submit the required verdict forms to the jury as to the claims involving Nelson's liability and Darlene Wightman's property damage claim.

We will first address appellant's assertions as to the specific instructions that it claims were erroneously excluded from the jury charge as well as the corresponding interrogatories that it asserts should have been submitted to the jury.

"It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 75 O.O.2d 331,

348 N.E.2d 135. However, the corollary of this maxim is also true. [Footnote omitted.] 'Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.' Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2. See, also, *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 57 O.O.2d 213, 275 N.E.2d 340, at the syllabus: *'In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.'* " (Emphasis added.) *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, 832.

The use of jury interrogatories is governed by Civ.R. 49(B), which provides in pertinent part:

"The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action on the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

"The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict."

Although Civ.R. 49(B) requires a trial court to submit interrogatories to the jury once it is requested to do so, the court still retains limited discretion "to reject submission of the interrogatories where the request is untimely or the proposed interrogatories are ambiguous, confusing, redundant, or otherwise legally objectionable. Proper jury interrogatories must address determinative issues and must be based upon trial evidence." *Ramage v. Cent. Ohio Emergency Serv., Inc.* (1992), 64 Ohio St.3d 97, 107, 592 N.E.2d 828, 836. In *Ramage, supra*, the court, citing *Ragone v. Vitali & Beltrami, Jr., Inc.* (1975), 42 Ohio St.2d 161, 165-166, 71 O.O.2d 164, 166, 327 N.E.2d 645, 649, stated:

"Authority is still vested in the judge to control the substance and form of the questions, and if the interrogatories are not based on the evidence, are incomplete, ambiguous or otherwise legally objectionable, the judge need not submit them to the jury." 64 Ohio St.3d at 107-108, 592 N.E.2d at 836.

This court has thoroughly reviewed the arguments of the parties concerning the jury charge, the entire transcript of the proceedings before the trial court and the applicable law. As to appellant's assertions going to the effect of the conduct of the decedent, this court finds that not only would the evidence not support the giving of such an instruction

and interrogatory but the requested instruction and interrogatory were not correct statements of the law. See *Payne v. Vance* (1921), 103 Ohio St. 59, 133 N.E. 85. As to appellant's assertion that the jury charge should have included the instruction and interrogatory as to the Sandusky police officer's conduct being a superseding and intervening cause, we find that the evidence in the record does not support the giving of such an instruction and interrogatory. As to appellant's assertions as to the issue of Nelson's liability not being submitted to the jury, the briefs and the record indicate that the parties stipulated that Nelson could be dismissed from the case and therefore it was not necessary to submit the issue of his negligence to the jury.[4]

As to appellant's assertions that the trial court's jury instructions were generally confusing, contradictory and erroneous:

"A charge to the jury should be a plain, distinct and unambiguous statement of the law as applicable to the case made before the jury by the proof adduced." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 19 OBR 8, 10, 482 N.E.2d 583, 585, citing *Parmlee v. Adolph* (1875), 28 Ohio St. 10, paragraph two of the syllabus. "* * * [A]n incomplete charge will constitute grounds for reversal of a judgment where the charge as given misleads the jury." *Marshall, supra*, 19 Ohio St.3d at 12, 19 OBR at 10, 482 N.E.2d at 585.

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4. The argument concerning Darlene Wightman's property damage claim and the punitive damage award will be dealt with later in this opinion.

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Upon consideration of the jury charge as a whole, in light of the evidence in the record and the applicable law, this court finds that charge met the standard set forth in *Marshall, supra*. Accordingly, appellant's second assignment of error is found not well taken.

C

In its third assignment of error appellant asserts that the trial court committed prejudicial error by admitting the opinion testimony of appellees' witness, William Berg, and the testimony of Glen Slyker. Appellant argues that: (1) Dr. Berg's testimony should not have been submitted to the jury as that of an "expert" because his testimony contained nothing of a scientific or technical nature and contained nothing that was necessary to assist the jury in understanding and deciding the facts before it; (2) the trial court erred in admitting Berg's testimony as to the existence and breach of legal duties; (3) Berg's testimony was based upon facts that were not in evidence; (4) Berg should not have been allowed to testify as to CRC's private company rule; and (5) witness Glen Slyker should not have been allowed to testify as to the applicability of certain company rules of the Norfolk & Western Railway.

Evid. R. 702 states:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."

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Evid. R. 703 states:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

Evid.R. 704 states:

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

The admissibility of expert testimony is a matter within the discretion of the trial court and its ruling thereon will not be disturbed on appeal absent a showing of an abuse of that discretion. *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153, 563 N.E.2d 339. An abuse of discretion implies an attitude by the trial court that is unreasonable, arbitrary, or unconscionable. *Ruwe v. Bd. of Springfield Twp. Trustees* (1987), 29 Ohio St.3d 59, 61, 29 OBR 441, 443, 505 N.E.2d 957, 958.

At the trial, appellees' witness, Dr. William Berg, was permitted to testify as an expert over appellants' objections. Berg first testified as to the materials he had reviewed and what he did to prepare for testifying at the trial. Berg then reviewed the conditions that existed at the time of the collision. Berg testified as to the time and space relationship of the trains and vehicles, and the perception points and reaction times of the motorists based upon all the impacting factors, including how the physical characteristics of the crossing grade affected those relationships. Berg also

testified as to the placement and operation of railway warning devices and how their unnecessary activation creates credibility problems and hazards which lead to accidents, which is a phenomenon that is well known to the railroad. Berg also stated that the railroad industry recognizes the hazards created by the unnecessary operation of automatic warning signals and, therefore, certain operating rules contain recommendations for such situations. Berg testified that CRC's Operating Rule 105[5] was such a rule and that it acknowledges that one train can obscure the approach of another and create a hazard by directing that to avoid unnecessary operation of automatic warning devices, engines and/or cars are not permitted to stand longer than necessary. Berg also testified that that particular rule contains a provision that when automatic warning devices are not operating properly the dispatcher must be notified and approaching trains must be directed to prepare to stop at crossings until highway traffic is protected. Berg then stated that, in his opinion, the principal causal factors of this collision were: the sight obstruction created by the stopped train; the operation of the warning devices for such a period of time that they created a credibility problem; the fact that the crew observed the conditions that existed, yet took no action to protect approaching motorists; and the fact that appellant's rules were unclear as to what action the crew

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5. A portion of CRC's Operating Rule 105 was read to the jury as follows: "When equipment is standing and obscuring the view of highway traffic, an employee must protect highway traffic against movement on adjacent tracks. Equipment stored on tracks close to a public crossing must be placed to permit a clear view for highway traffic using the crossing. When space permits, equipment must be placed three hundred (300) feet from the crossing."

was to take in such circumstances. Berg also testified that the decedent's conduct was reasonable under the circumstances since any reasonable person would have believed that the warning devices were not functioning properly and that it was safe to proceed cautiously. Berg testified also as to reasonable alternatives that were available to appellants which would have accommodated their needs and interests while at the same time protected the crossing and the motorists.

Later in the trial Glen Slyker, a retired engineer for Norfolk & Western Railway, was called to testify by appellees as a rebuttal witness.[6] Slyker testified that he reviewed the operating book for Norfolk & Western Railway and that there were rules contained therein that applied in the type of situation that existed in this case. Slyker also testified that based upon his experience and his observation of customs and practices observed during his years with Norfolk & Western, he had encountered many situations in which he had to stop a train within three hundred feet of a crossing and that there were rules in the book governing such situations. He cited specifically to Rule 101(3) which provided that when the end of a train stands near a grade crossing, a crew member must, when practicable, protect the crossing from movement on the adjacent tracks.

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6. Slyker was called to rebut testimony by appellant CRC's witness, Louis Nelson. Nelson testified that he had reviewed the operating rules for two other major railroads operating in Ohio and found that both Norfolk-Southern Railroad and CSX had rules similar to CRC's Operating Rule 105. Nelson stated that these two rules, N.S. 103(c) and CSX Rule 100-F provided that the required distances for storing equipment near a crossing was only 100 feet.

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Upon consideration of the testimony of William Berg and the law as set forth above, this court finds that the trial court did not abuse its discretion in finding that it was necessary to assist the jury and that the admission of this testimony was in compliance with Evid.R. 703, 704 and 705. This court finds further that the trial court did not abuse its discretion in admitting Berg's testimony as to CRC's Rule 105 and Glen Slyker's testimony as to the rules of other railway companies, particularly given the cautionary instructions that were read to the jury concerning their consideration of these rules.[7] See *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164, 529 N.E.2d 1382, 1384. Accordingly, appellant's third assignment of error is found not well taken.

As its fourth assignment of error, appellant sets forth a general assignment of error encompassing all other errors that occurred at trial. Since appellant has set forth no arguments in support of this assignment of error, we need not address it. App.R. 12(A); *State v. Rivers* (1977), 50 Ohio App.2d 129, 135, 4 O.O.3d 100, 103, 361 N.E.2d 1363, 1367. Accordingly, appellant's fourth assignment of error is found not well taken.

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7. The following cautionary instruction was given to the jury both during the course of the trial and in the court's final instructions:

"You are cautioned that the legal standard of care one party owes to another is set by the law. Just as one party may not ignore a duty owed to another by the promulgation of a private rule, a legal duty is not created to a non-employee by the promulgation of a private rule and the violation of such a rule, even if proven, is not negligence in and of itself. Any alleged violation of a company rule may be considered by you along with all other evidence presented during trial on the issues presented."

Appendix A

II. CROSS-APPEAL

A

In their first cross-assignment of error appellees assert that the trial court erred by refusing to submit the issue of punitive damages to the jury. In support of this assignment of error appellees argue that that portion of R.C. 2315.21,[8] which provides that the amount of punitive damages to be awarded is to be determined by the court and not the jury violates Section 5, Article I of the Ohio Constitution[9] since it denies the right to a jury trial on the issue of damages to persons who suffer injury as a result of intentional wrongdoing. Appellees assert that Article I guarantees an individual the opportunity to have all factual issues in a civil action decided by a jury and that, although the Supreme Court of Ohio has not ruled on the constitutionality of this particular

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8. R.C. 2315.21(C) provides in pertinent part:

"(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive damages.

"(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court."

9. Section 5, Article I of the Ohio Constitution provides:

"The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of any verdict by the concurrence of not less than three-fourths of the jury."

statute, its decision in *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 533 N.E.2d 743, makes it clear that the statute is unconstitutional.

In response, appellant argues that this issue is moot since there is no actual property damage award in the record on which to base an award of punitive damages. In the alternative, appellant asserts that in *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 590 N.E.2d 737, the Supreme Court of Ohio determined that, since the right to punitive damages is an equitable right, as opposed to a legal one, a litigant has no constitutional right to have a jury determine the amount of punitive damages.

Initially we note that "[a]ll legislative enactments enjoy a presumption of constitutionality." *Sedar v. Knowlton Constr. Co.* (1990), 49 Ohio St.3d 193, 551 N.E.2d 938. A statute will be declared invalid only if its unconstitutionality is shown beyond a reasonable doubt. *Zoppo v. Homestead Ins. Co.* (July 8, 1993), Cuyahoga App. No. 62926, unreported, 1993 WL 262641, citing *Cincinnati Bd. of Edn. v. Walter* (1979), 58 Ohio St.2d 368, 376, 12 O.O.3d 327, 331, 390 N.E.2d 813, 819.

We find appellees' assertion that the Supreme Court's decision in *Kneisley*, *supra*, requires us to find R.C. 2315.21 unconstitutional to be without merit. That case concerns the right to a jury trial for the assessment of damages in intentional tort actions against an employer and we decline to apply it to the case before us.

We do find, however, that the decision of the Supreme Court in *Digital & Analog Design Corp., supra*, is dispositive of this issue. In that case the court determined that an award of attorney fees in a tort action does not compensate the victim for damages flowing from the tort but is, rather, a "punitive (and thus equitable) remedy that flows from a jury finding of malice and the award of punitive damages." *Id.*, 63 Ohio St.3d at 662, 590 N.E.2d at 742. The *Digital* court found that there was no constitutional right to a trial by jury on the issue of what amount of attorney fees should be awarded in a tort action. *Id.* That court also stated:

"The General Assembly, through its enactment of R.C. 2315.21 and the amendment of R.C. 2315.18, [footnote omitted] has now clarified that it is a proper function for the trial court, in a jury trial in a tort action, to determine the amount of punitive damages, but that the issue of liability is expressly reserved to the jury. Although these provisions were not in effect at the time the instant cause of action arose, we are nonetheless persuaded that the approach taken by the legislature is the proper course for the development of the common law of this state." *Id.*, 63 Ohio St.3d at 663, 590 N.E.2d at 742-743.

In accordance with the foregoing this court finds that appellees have failed to demonstrate beyond a reasonable doubt that the provision of R.C. 2315.21 that directs that the court determine the amount of punitive damages to be awarded in a tort action once the finder of fact determines liability therefor is unconstitutional. See *Zoppo, supra*. Accordingly, appellees' first assignment of error is found not well taken.

Appendix A

B

In their second cross-assignment of error appellees assert that the trial court erred in refusing to award punitive damages, attorney fees and costs to Darlene Wightman on her property damage claim. Appellees argue that, while the amount of punitive damages to be awarded lies within the discretion of the trial court, it was not within the court's discretion to fail to award any punitive damages when the jury expressly found that they are to be assessed. Appellees argue further that once the finder of fact determines that punitive damages may be recovered, an award of attorney fees and costs is also warranted.

In response, appellant argues that the trial court properly denied an award of punitive damages because there is no verdict or judgment on Darlene Wightman's property damage claim and punitive damages are not recoverable in a wrongful death action; that while appellant did stipulate at trial as to the value of the car, it did not stipulate as to the issue of liability, since the question of Darlene's comparative negligence was at issue; and that the issue of their liability for the damage to Darlene Wightman's car was never submitted to the jury and no judgment was entered in her favor on that claim. Appellant argues in the alternative that even if there was a judgment or verdict on the property damage claim, the trial court has discretion to refuse to grant an award of punitive damages based upon a finding that actual damages were insufficient to support the award, citing *Ray v. Engard* (Nov. 22, 1985), Lucas App. No. L-85-051, unreported, 1985 WL 8229; *Case v. Norfolk & W. Ry. Co.* (1988), 59 Ohio App.3d 11, 570 N.E.2d 1132; *Clark v. Totten*

(Apr. 24, 1986), Cuyahoga App. Nos. 50535, 50536, unreported, 1986 WL 4970; *Williams v. McCrory Corp.* (Jan. 11, 1985), Montgomery App. No. 8963, unreported, 1985 WL 6680. Finally, appellant asserts that the trial court's decision to award no punitive damages was proper in that the evidence presented at trial did not support a finding of actual malice.

It is not disputed that punitive damages are not recoverable in a wrongful death action. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 8 O.O.3d 11, 374 N.E.2d 411. The recovery of punitive damages in tort actions is provided for, however, by R.C. 2315.21, which provides in pertinent part:

"(B) Subject to division (D) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply:

"(1) The actions or omissions of that defendant demonstrate malice, aggravated or egregious fraud, oppression, or insult, or that defendant as principal or master authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate;

"(2) The plaintiff in question has adduced proof of actual damages that resulted from actions or omissions as described in division (B)(1) of this section.

"(C)(1) In a tort action, the trier of fact shall determine the liability of any defendant for punitive or exemplary damages.

"(2) In a tort action, whether the trier of fact is a jury or the court, if the trier of fact determines that any defendant is liable for punitive or exemplary damages, the amount of those damages shall be determined by the court.

"(3) In a tort action the burden of proof shall be upon a plaintiff in question, by clear and convincing evidence, to establish that he is entitled to recover punitive or exemplary damages."

The first question we must address is whether the jury's determination that CRC is liable for punitive damages was proper without a verdict or judgment on Darlene Wightman's property damage claim. The complaint in this action set forth a claim for property damage for Darlene Wightman's car, which was the vehicle the deceased was driving, and for an award of punitive damages. During the course of the trial the parties agreed to stipulate to the value of the vehicle. At the conclusion of the trial, the court did not instruct the jury on Wightman's property damage claim or submit a verdict form on that issue. Although there appears to be no judgment entry in the record as to the property damage claim, we find that, since the jury determined that liability for the collision rests with appellant CRC based on its finding of actual malice, appellee Darlene Wightman is, as a matter of law, entitled to judgment on the property damage claim in the amount stipulated by the parties. Accordingly, upon the trial court, on remand, entering the appropriate judgment on the property damage claim, there is a proper basis for the award of punitive damages. As to the issue of comparative negligence, we find that since the jury determined that CRC acted with malice, the existence of contributory negligence

would not defeat or diminish her recovery of damages. *Schellhouse, supra.*

Having determined that there is a proper basis for the award of punitive damages, we must then address the issue of whether the trial court abused its discretion in awarding no punitive damages. Appellant asserts that the trial court properly refused to award any amount for punitive damages because the actual damages of $2,000 were insufficient to support an award. Again, due to its summary entry, we do not know the basis for the trial court's denial of punitive damages.

Upon review of R.C. 2315.21, however, we find that it does not require that the actual damages upon which an award of punitive damages is based be substantial. Although the General Assembly has not set forth the factors to be considered, our review of cases dealing with awards of punitive damages compels us to conclude that the amount of the actual damages sustained should not be the sole factor in determining the appropriate award of punitive damages. Rather, a number of factors must be considered by a trial court in making its determination, while keeping in mind that the purpose behind an award of punitive damages is punishment of the guilty party and the deterrence of similar conduct in the future. See, generally, *Villella v. Waikem Motors, Inc.* (1989) 45 Ohio St.3d 36, 543 N.E.2d 464; *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473, 575 N.E.2d 416, 419. These factors would necessarily include, but are not limited to, the nature of the conduct that resulted in the injury, the financial condition of the defendant, the amount necessary to deter future similar

conduct, and prior or similar acts by the defendant, as well as the amount of actual or compensatory damages. *Villella, supra*; *Spadafore v. Blue Shield* (1985), 21 Ohio App.3d 201, 21 OBR 215, 486 N.E.2d 1201; *Estate of Morad v. Task* (Mar. 10, 1994), Cuyahoga App. No. 64787, unreported, 1994 WL 78157.

In light of all of the foregoing, this court finds that the trial court abused its discretion in failing to award any amount for punitive damages after the jury determined that appellees are entitled to such an award.

As to appellant's assertion that the evidence did not support the jury's finding of actual malice, the term "actual malice" is defined as: "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (Emphasis *sic.*) *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

Upon consideration of the entire record of proceedings in the trial court, we find that there was clear and convincing evidence to support the jury's finding of actual malice on the part of appellant CRC.

As to the issue of attorney fees, although our review of the record shows that appellees requested an award of attorney fees and costs, and the issue was briefed by both parties, there appears to be nothing in the record to indicate that the trial court ever ruled on that request. This issue is therefore not before us on appeal but remains for the trial court to address upon remand by this court.

Accordingly, appellees' second cross-assignment of error is found well taken in part and not well taken in part.

C

In their third cross-assignment of error appellees assert that the trial court erred in refusing to order CRC to pay interest at the statutory rate on the $1,000,000 compensatory damage award from the date of the jury's verdict, or in the alternative, for each day that the entry of judgment was delayed as a result of appellants' motion to disqualify the trial judge.

As to this issue as well, our review of the record indicates that, although this matter was raised and briefed, no disposition was made by the trial court. This issue therefore is not before us on appeal but remains for the trial court to address upon remand by this court. Accordingly, appellees' third cross-assignment of error is found not well taken.

On consideration whereof, this court finds that the decision of the Erie County Court of Common Pleas is affirmed in part and reversed in part. The decision of that court denying appellee, Darlene Wightman, any award of punitive damages is reversed and this case is remanded to the trial court for determination as to the amount of punitive damages to which appellee, Darlene Wightman, is entitled in accordance with this opinion and for disposition of all remaining matters.

Appendix A

Court costs assessed to appellants.

Judgment affirmed in part,
reversed in part
and cause remanded.

GLASSER and SHERCK, JJ., concur.

APPENDIX B — EXCERPTS FROM TRIAL TRANSCRIPT OF THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO DATED MAY 20, 1996

IN THE COMMON PLEAS COURT OF
ERIE COUNTY, OHIO

No. 89-CV-4161

DARLENE M. WIGHTMAN, Admx. of the Estate of
MICHELLE L. WIGHTMAN, Deceased, et al.

Plaintiffs

– vs –

CONSOLIDATED RAIL CORPORATION, et al.

Defendants

HONORABLE JOSEPH E. CIRIGLIANO,
Presiding

May 20, 1996

* * *

[186] * * *

Q Go slowly, Mr. Knehr, if you would.

A Can I sit down?

THE COURT: Sure, go ahead.

A There were a couple of cars in front, they headed up this way, and we followed them. A couple of cars got up here and slowed down, went around, and another car would come this way. And then finally it was their turn, and we were behind them still. They got up there, slowed down a couple of miles an hour, started going around.

Q What was your intention at that point?

A I was going to wait for them to go, and probably wait for a car maybe to come this way, and kind of a view and then go around myself. And started — well, the train was parked over here about one hundred foot away with its headlight on, and there was nobody there to, you know, direct traffic or anything, the cop was down here. They started going around, got about halfway or so, and all of a sudden the light got really bright. I didn't hear a horn or anything, the only thing I knew about the train being there was another headlight.

Q Then what happened? How long after you saw that [187] light, how long elapsed until the car was hit?

A It was only a couple of seconds. They didn't have a chance it didn't seem like. They weren't going to make it as slow as they were going. And the train came up, hit them, pushed them off and over the tracks. The train finally slowed down, stopped. During that time, Tim got out, he ran down and got the cop. And he came up, he called on the CB, and waited for the train to stop to see

what happened to the car. And then I forgot, and I was scared, didn't know what to do. And that's it.

* * *

[300] * * *

MR. MURRAY: That's true. One of the elements that the Court of Appeals has laid out specifically is the nature of the conduct. Why in the world would you (inaudible) because you don't think the nature of the conduct is very serious. You have got the police officer (inaudible) for your opening statement. You're going to bring in a reconstructionist. Yesterday you introduced the fact, you suggested that you could see the headlights.

MR. HOWES: I'm not — who said I'm bringing in a reconstructionist?

MR. MURRAY: You said in your opening statement that you could see the headlight and you're suggesting for something like twelve seconds. And all I'm trying to do is —

MR. HOWES: Am I going to be allowed to bring that person in here to show that, Judge?

THE COURT: Pardon?

MR. HOWES: Am I going to be allowed to do that?

Appendix B

[301] MR. MURRAY: I would think if he can show that she could see the headlight for twelve seconds, of course, he should be able to bring (inaudible).

THE COURT: Sure. He didn't have a problem with that. So I will let you do that.

* * *

[626] * * *

Q Another thing that was testified to by the expert for Plaintiff was this and let me read the answer that he gave, he said, "It's fruitless to attempt to put in a physical system that's permanently located at one location only and say that we're going to solve this problem, I mean the problem similar to the one encountered in this accident, because you can't predict when a problem is going to occur," would you agree with that?

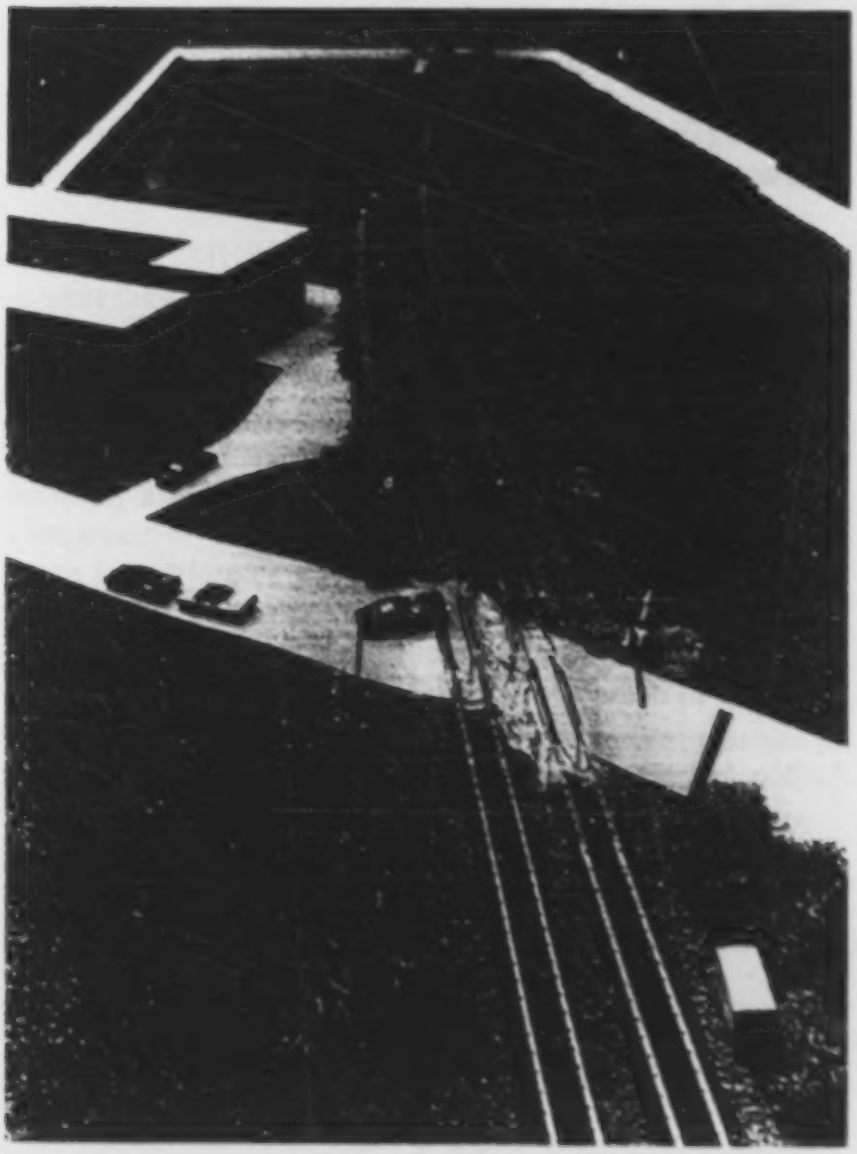
A No, I don't agree with that.

Q There are locations where you can predict because of the nature of the train movements that this type of [627] thing could have occurred?

A Well, this type of thing could occur at so many locations.

* * * *

APPENDIX C — PHOTOGRAPH OF MODEL OF ACCIDENT SITE



APPENDIX D — CASES IN WHICH THE MURRAY & MURRAY CO., L.P.A. WAS LEAD COUNSEL FOR A PARTY OR *AMICUS CURIAE* IN THE OHIO SUPREME COURT

Delli Bovi v. Pacific Indemnity Co., 85 Ohio St. 3d 343 (1999); Stacy v. Nationwide Mut. Ins. Co., 85 Ohio St. 3d 1203 (1999); State ex rel. Banc One v. Walker, 86 Ohio St. 3d 169 (1999); Waite v. Progressive Ins. Co., 85 Ohio St. 3d 1226 (1999); Wightman v. Consolidated Rail Corp., 715 N.E.2d 546 (1999); Cope, et al. v. Metro. Life Ins. Co., 82 Ohio St. 3d 426 (1998); Landis v. Grange Mut. Ins. Co., 82 Ohio St. 3d 339 (1998); Chance v. BP Chemicals, Inc., 77 Ohio St. 3d 17 (1996); Coleman v. Sandoz Pharmaceuticals Corp., 74 Ohio St. 3d 492 (1996); Hacker v. Dickman, 75 Ohio St. 3d 118 (1996); Roberts v. United States Fid. & Guar. Co., 75 Ohio St. 3d 630 (1996); State ex rel. Lyons v. Zaleski, 75 Ohio St. 3d 623 (1996); Weston v. Weston Paper & Mfg. Co., 74 Ohio St. 3d 377 (1996); Kenty v. Transamerica, 72 Ohio St. 3d 415 (1995); Ross v. Tom Reith, Inc., 71 Ohio St. 3d 563 (1995); Sharp v. Norfolk & Western Ry. Co., 72 Ohio St. 3d 307 (1995); Borsick v. State Farm Fire & Cas. Co., 68 Ohio St. 3d 1221 (1994); Frazier v. Depinet, 69 Ohio St. 3d 1211 (1994); Freeman v. Norfolk & Western Ry. Co., 69 Ohio St. 3d 611 (1994); Horner v. Toledo Hospital, 70 Ohio St. 3d 1211 (1994); Leber v. Smith, 70 Ohio St. 3d 548 (1994); Phung v. Waste Management, 71 Ohio St. 3d 408 (1994); Sanderson v. Ohio Edison Co., 69 Ohio St. 3d 582 (1994); Sorrell v. Thevenir, 69 Ohio St. 3d 415 (1994); Zoppo v. Homestead Insurance Company, 71 Ohio St. 3d 552 (1994); Borsick v. State Farm Mut. Auto. Ins. Co., 68 Ohio St. 3d 81 (1993); Brinkman v. Ross, 68 Ohio St. 3d 82 (1993); Polikoff v. Adam, 67 Ohio St. 3d 100 (1993); Manufacturer's Natl. Bank of Detroit v. Erie

County Road Commission, 63 Ohio St. 3d 318 (1992); Motorists Mutual Ins. Co v. Andrews, 65 Ohio St. 3d 362 (1992); Motorist Mut. Ins. Co. v. Said, 63 Ohio St. 3d 690 (1992); Padilla v. YMCA of Sandusky Co., 64 Ohio St. 3d 1439 (1992); Brady v. Safety-Kleen Corp., 61 Ohio St. 3d 624 (1991); Schellhouse v. Norfolk & Western Ry. Co., 61 Ohio St. 3d 520 (1991); Drage v. Ameritrust Corp., 49 Ohio St. 3d 604 (1990); Huston v. Konieczny, 52 Ohio St. 3d 214 (1990); Renfro v. Smith Labs, 52 Ohio St. 3d 27 (1990); State ex rel. The Ohio Company v. Maschari, 51 Ohio St. 3d 18 (1990); Stepak v. Schey, 51 Ohio St. 3d 6 (1990); Burris v. Grange Mut. Companies, 46 Ohio St. 3d 84 (1989); Crosby v. Beam, 47 Ohio St. 3d 105 (1989); Digital v. Analog Design Corp. v. North Supply Co., 44 Ohio St. 3d 36 (1989); Miller v. Wikel Mfg. Co., Inc., 46 Ohio St. 3d 76 (1989); Carney v. McAfee, 35 Ohio St. 3d 52 (1988); Gressman v. McClain, 40 Ohio St. 3d 359 (1988); Sharp v. Norfolk & Western Ry. Co., 36 Ohio St. 3d 172 (1988); Warner v. Waste Management, Inc., 36 Ohio St. 3d 91 (1988); Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397 (1987); Horman v. Veverka, 30 Ohio St. 3d 4 (1987); Viock v. Stowe-Woodward Co., 34 Ohio St. 3d 602 (1987); Phung v. Waste Management, Inc., 23 Ohio St. 3d 100 (1986); Jones v. VIP Development Co., 15 Ohio St. 3d 90 (1984); Kisil v. City of Sandusky, 12 Ohio St. 3d 30 (1984); Sumwalt v. Allstate Ins. Co., 12 Ohio St. 3d 294 (1984); Yeager v. Local Union 20, 6 Ohio St. 3d 369 (1983); Noroski v. Fallet, 2 Ohio St. 3d 77 (1982); Ruta v. Breckenridge-Remy Co., 69 Ohio St. 2d 140 (1982); Masheter v. Welschenbach, 48 Ohio St. 3d 8 (1976); State v. Chaffin, 30 Ohio St. 2d 13 (1972).

APPENDIX E — EXCERPTS FROM TRIAL TRANSCRIPT OF THE COURT OF COMMON PLEAS, ERIE COUNTY, OHIO DATED OCTOBER 16, 1990

IN THE COURT OF COMMON PLEAS,
ERIE COUNTY, OHIO

CASE NO. 89-CV-416

DARLENE M. WIGHTMAN, Admrx. of the Estate of Michelle L. Wightman, Deceased, et al.,

Plaintiffs

– vs –

Consolidated Rail Corp., et al.,

Defendants.

TRANSCRIPT
VOLUME ONE

TRANSCRIPT of MOTIONS BEFORE TRIAL; TRIAL OF OCTOBER 16, 17, 18, 19, 22, 23, 24, 25, 26, 29 and 30, 1990; and HEARINGS OF NOVEMBER 3, 1990; AUGUST 9, 1991; AND SEPTEMBER 20, 1991, had before HONORABLE ANN B. MASCHARI, Judge, Court of Common Pleas, Erie County, Ohio.

* * *

[1062] Q Now, I want to go over very, very carefully with you as you think about this, Michelle .... Stephanie,

Appendix E

I want to go through every moment that evening when you can recall seeing Michelle Wightman with anything of an alcoholic nature in her hand, whether she had it in her hand or whether she's actually drinking it; okay?

A (No audible response).

Q Now, can you remember approximately when it was that evening that you first saw Michelle Wightman with something of an alcoholic nature in her hand?

A It was about ten . . . . about quarter to nine. It was about fifteen minutes before we went and picked up Carrie. We . . . . Michelle went in her sister's room. That's where we had it kept, in her sister's room, and she got a wine cooler out and I seen her open it and I seen her take a sip of it.

Q All right. Now, is that the first time that evening you'd seen Michelle drink anything?

A Yes.

Q Did you observe how much of it she drank?

A No. I know it wasn't much because it was still . . . . I seen that it was full. It wasn't —

Q Okay. Now, just try and focus on that for a minute. You saw her take a sip?

A Yeah.

Appendix E

[1063] Q And what did she do with it?

A She set it down.

Q Now, did you happen to observe how much was in that wine cooler when she set it down?

A No, I don't . . . . I don't pay attention.

Q Had you been with Michelle most of the time at least up till a quarter to nine when you saw her take this sip?

A Yeah, I was with her the whole time.

Q And that's the first time you saw her take anything —

A Yes.

Q — of an alcoholic nature that night?

A Yes.

Q Did you see her drink any pop or anything like that?

A No. Earlier in the day but not at night.

Q Now, at that point, if I understand it, was that when Carrie called up and said come get me?

A Yes.

Q Did you go with Michelle?

A Yes.

Q Was Michelle perfectly normal in the way she talked and walked and drove a car?

A Yes.

Q And you went over and got Carrie at her house?

* * *

[1071] Q Now, did you have an opportunity at that time, Stephanie, to observe Michelle and how was she acting and so forth?

A She was fine. She was normal like how she always was.

Q How is she always .... how is it that she always was, Stephanie?

A She was the kind of person outgoing; she would make friends with you; she was real friendly; she was .... she was fun to be around.

Q Now, at that point, at the point where Michelle shakes you out of your sleep and says you want to come with me while I take Carrie home, thinking back again to everything that you've now been able to remember about that evening, do you remember Michelle having anything of an alcoholic nature in her hand or drinking it other than those two occasions you've described; that is, when she took a sip and put it down on the table or when you

saw her drinking what you don't know was the same wine cooler or a different one after you got back?

A I seen her with two wine coolers and two beers in her hand. She was taking them into the living room here everybody . . . . there was a whole . . . . there was Bobby and his friends were there.

Q All right. Now, I don't think . . . . I don't think that . . . . is that on the statement about her having the [1072] two wine coolers and two beers in her hand taking them in? I don't remember.

A No.

Q Okay, all right. So if the question is . . . . if I understand you, Stephanie, if the question is what you saw Michelle Wightman consume, it would have been two occasions when you saw her drinking from either two different wine coolers or the same wine cooler; is that right?

A Right.

Q Now, if the question is did you see her with anything of an alcoholic nature in her hand, then what is the answer?

A I seen her with the wine cooler that she was drinking and the two other ones and the two beers that she was taking into the living room.

Q I see. Now, when you saw her with these two wine coolers and two beers, what, was she carrying them into where the gang was gathered?

A Yes.

Q Is that it?

A Yeah.

Q All right. Now, at any time did you see Michelle Wightman open a bottle of beer that evening?

A I don't know. I don't —

[1073] Q Did you ever see her take a sip from any bottle of beer that evening?

A Not that I remember. I remember hearing Bobby say . . . . Bobby said —

Q Don't get into what other people said.

A Okay, no.

Q Just what you saw.

A No.

Q At any time that evening did you see Michelle Wightman take a drink from any bottle of beer or can of beer?

A No.

Q Stephanie, can you remember any time that you've been with Michelle in your entire life when you've seen her drink a beer?

A No.

Q You have seen her drink wine coolers?

A Yes.

Q Have you seen her drink wine coolers in fact at home with her mother present?

A Yes.

Q Now, Stephanie, what kind of a . . . . you may not . . . . whether you zonk out or not, what kind of a sleeper are you?

A I'm a heavy sleeper.

Q And when you went to sleep that evening, do you think . . .

* * * *

APPENDIX F — DEFENDANT'S MOTION FOR RECUSAL AND CONTINUANCE OF THE TRIAL

IN THE COURT OF COMMON PLEAS
ERIE COUNTY, OHIO

CASE NO: 89-CV-416

JUDGE MASCHARI

DARLENE M. WIGHTMAN, et al.,

Plaintiffs,

v.

CONSOLIDATED RAIL CORPORATION, et al.,

Defendants.

DEFENDANT'S MOTION FOR RECUSAL AND CONTINUANCE OF THE TRIAL

Defendant, Consolidated Rail Corporation, respectfully moves the court to recuse herself from this case and to continue the trial. Defendant submits this motion on the basis that events occurring after the remand order from the court of appeals have caused defendant to lose confidence in the impartiality of the court.

In support of the motion, defendant submits copies of the attached letter which it hand-delivered to Judge Maschari on March 31, 1995, and the letter sent by plaintiff's counsel to the court on January 25, 1995.

Appendix F

Respectfully submitted,

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Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(5)

No. 99-950

In The

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

DARLENE M. WIGHTMAN, Administratrix of the Estate of MICHELLE L. WIGHTMAN, Deceased; MICHELLE WIGHTMAN CHARITABLE FOUNDATION,

Respondents.

On A Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

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14pp

DESIGNATION OF CORPORATE RELATIONSHIPS

The Designation of Corporate Relationships set forth at page ii of Petitioner's petition for a writ of *certiorari* is incorporated by reference herein.

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PETITIONER'S REPLY BRIEF

Respondents' brief in opposition ("Opp.") to Consolidated Rail Corporation's ("Conrail") petition for a writ of *certiorari* fails to confront the fundamental argument at the heart of that petition: that the Due Process Clause of the Fourteenth Amendment is violated when a state imposes a $15,000,000 punitive damages award where there exists a substantial possibility of judicial bias by the state's highest court – which affirmed the award without addressing this serious issue – and where the state courts deprived defendant of a full and fair opportunity to present its defense to that award. Moreover, nothing in the opposition refutes Petitioner's arguments that the significant due process issues raised deserve this Court's attention to ensure that litigants in both state and federal court receive a full and fair opportunity to defend against – and seek review of – the imposition of substantial punitive damages awards, and that the imposition of such awards be rational, foreseeable and consistent.

Rather, the brief in opposition: (1) simply repeats the flawed analysis of the Ohio Supreme Court, in which that court misapplied *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); (2) does not even attempt to defend the state court's exclusion of critical evidence – evidence that led a prior jury to determine that the victim was 40% responsible for the accident and a prior judge to conclude that no punitive damages were due; and (3) erects irrelevant and erroneous arguments in its attempt to evade this Court's review of the serious due process issues raised in the petition.

ARGUMENT IN REPLY

I. PETITIONER PROPERLY RAISED IN THE OHIO STATE COURTS THE CLAIM THAT ITS DUE PROCESS RIGHTS WERE VIOLATED BY THE IMPOSITION OF AN EXCESSIVE PUNITIVE DAMAGES AWARD THROUGH A FUNDAMENTALLY FLAWED PROCESS.

Prior to visiting the merits of Respondents' arguments in opposition to the central due process issues raised by this petition, we consider briefly the procedural challenges Respondents advance. Specifically, Respondents' argument that, "Petitioner did not raise a due process issue below regarding the campaign contributions to Justices Pfeifer and Sweeney," Opp. at 17, is factually incorrect and legally misleading. First, Conrail's petition expressly poses the question whether the Due Process Clause is violated by the imposition of the punitive damages award after a process that was fundamentally flawed – a claim indisputably raised in the Ohio courts – and asserts several arguments in support of that claim, each of which (including the campaign contribution issue) was raised before the Ohio Supreme Court.

Conrail's first Question Presented seeks review of the *claim* it repeatedly pressed before the Ohio trial and appellate courts: that imposition of a substantial punitive damages award following a fundamentally flawed process violated its right to due process. Contrary to Respondents' suggestion, the *argument* that this unconstitutional award was affirmed by a state supreme court tainted by potential judicial bias – as well as that court's refusal to address this issue – is properly before this Court.

As this Court recently made clear:

> Once a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below. . . .
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

Yee v. City of Escondido, 503 U.S. 519, 534-35 (1992) (emphasis added); *cf. Adams v. Robertson*, 117 S. Ct. 1028, 1031 (1997) (per curiam) (dismissing writ of *certiorari* as improvidently granted when the "broader federal claim" raised in the *certiorari* petition – that approval of a class action settlement violated the Due Process Clause – was not raised before the state court); *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983) (noting that two issues, one raised below and the other not, might be "so connected" that both are properly presented in a *certiorari* petition and should be treated by the Court as simply two related grounds "for alleging the invalidity of the [lower court's] judgment" (quoting *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899)) (alteration in original)).[1]

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[1] Respondents' argument, *see* Opp. at 20-22, that this Court should not consider Petitioner's judicial bias argument because Conrail did not follow the proper state procedure for raising this issue is unavailing. This is essentially an "independent and adequate state grounds" objection to the *certiorari* petition. For a state court's decision to rest on independent and adequate state grounds precluding review by this Court, such grounds must be "clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). Yet, the Ohio Supreme Court did not deny

Moreover, to the extent that Conrail's due process arguments in this Court involve the Ohio Supreme Court's utter refusal even to consider Conrail's recusal motion, this Court is the only forum in which Petitioner possibly could advance these arguments. The procedural posture of this case is thus similar to *Wood v. Georgia*, 450 U.S. 261 (1981), in which this Court reached a due process argument that was not expressly raised in the state courts but was inextricably connected to the procedural history of the case. The petitioners in *Wood*, who were convicted of distributing obscene materials, failed to make certain court-ordered payments and their probation was revoked. In the state courts, they challenged the revocations on equal protection – but not on due process – grounds. The Court viewed as a potential unconstitutional conflict of interest the fact that the petitioners had been represented throughout the state proceedings by an attorney chosen and paid for by their employer and noted that "[t]he party who argued the appeal and prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused," making it unlikely that the issue would be raised below. *Id.* at 265 n.5. Eight members of the Court endorsed the majority's

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Conrail's recusal motion on the ground that it was untimely or procedurally defective, let alone do so clearly, as required by *Long*. In fact, it did not rule on the motion at all.

In any event, Conrail's recusal motion was procedurally proper and timely, coming as it did shortly after the final campaign reports for 1998 were filed and before any decision had been rendered in the appeal to the state supreme court. *See* Pet. App. 76a-77a; *cf. Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 819 (1986) (finding that the Court had jurisdiction despite petitioner's failure to raise the recusal issue until *after* the state supreme court had issued its decision).

statement that, "[w]here, as here, a possible due process violation is apparent on the particular facts of a case, we are empowered to consider the due process issue." *Id.* at 264-65.

As in *Wood*, the procedural history of this case is closely related to the due process claim, given the Ohio Supreme Court's refusal to address Petitioner's judicial bias argument. This inaction by the state court denied Conrail due process of law and left it with no recourse but to present its allegations of judicial bias to this Court. In short, Respondents' efforts to avoid this Court's review of the serious constitutional questions raised by this case should be rejected.

Finally, in arguing that a constitutionally required fair tribunal exists as long as an adjudicator does not have a "direct interest in the outcome" of a case, Opp. at 18, Respondents miss the central point of Conrail's due process argument. The substantial campaign contributions to two of the Ohio Supreme Court's seven justices raised the possibility that they might not "hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *cf. Nixon v. Shrink Mo. Gov't PAC*, No. 98-963, slip op. at 10 (U.S. Jan. 24, 2000) ("[T]he perception of corruption inherent in a regime of large individual financial contributions to candidates for public office [is] a source of concern almost equal to *quid pro quo* improbity." (citation and internal quotation omitted)). When the court nonetheless affirmed the questionable punitive damages award without even acting on Conrail's recusal motion, Conrail was denied its right to due process of law, including full, fair, "meaningful and adequate" review of a punitive damages award. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991).

In any event, the resulting harm is clear. Petitioner appealed to the Ohio Supreme Court because it believed that the judgment of the lower court had violated its due process rights. The Ohio Supreme Court, with one of the justices who had received the substantial campaign contributions authoring the opinion, rejected Petitioner's contentions, and then added millions of dollars in post-judgment interest on the punitive award, a first in Ohio jurisprudence. It is small consolation to Conrail that, as Respondents emphasize, the state supreme court did not reinstate the remitted portion of the punitive damages award. *See* Opp. at 20. Moreover, the two justices' votes on the remittitur issue are irrelevant to the underlying due process issue, as their participation in the court's deliberation and decision while their impartiality was in question "was sufficient in itself to impugn the decision." *Lavoie*, 475 U.S. at 830-31 (Brennan, J., concurring).

II. RESPONDENTS ARE UNABLE TO DEFEND THE OHIO STATE COURT'S EXCLUSION OF DEFENDANT'S CRITICAL EVIDENCE WITH RESPECT TO THE CIRCUMSTANCES OF THE ACCIDENT.

In its petition, Conrail showed that it had been denied its basic due process right of being permitted to introduce significant relevant evidence in its own defense prior to the imposition of the $15,000,000 punitive award. In response, rather than attempting to defend the state courts' denial of Conrail's rights, Respondents resort to rearguing factual points that the state courts already rejected. Specifically, in a desperate attempt to avoid the unconstitutional effect of the trial court's rulings, Respondents argue, at this late stage, that the trial court did not

prevent Conrail from presenting its evidence regarding the facts and circumstances surrounding the collision. *See* Opp. at 14-16.

But, it is clear that the trial court, in a decision later ratified by the state's appellate courts, in fact did exclude Conrail's evidence that would have provided a complete and fair picture of the cause of the accident and of the factors outside of Conrail's control that increased the likelihood of the accident occurring. Pet. App. 5a; 38a; 69a-70a.[2] Indeed, while ruling that the exclusion of Conrail's evidence was permissible, none of the Ohio courts ever questioned the threshold point Respondents now press: whether Conrail's evidence had been excluded in the first place. Respondents' choice to reargue stale factual issues rather than respond to Conrail's substantive arguments is telling.

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[2] The Supreme Court of Ohio accepted the fact that Conrail's proffered evidence had been rejected: "The trial court prohibited Conrail from introducing evidence it had introduced at the first trial regarding certain circumstances surrounding the accident. . . . The court granted plaintiffs' motions *in limine* regarding evidence of Michelle Wightman's .039 percent blood-alcohol level. . . . The court also granted plaintiffs' motion *in limine* regarding the testimony from a Conrail expert regarding the effect that alcohol and a driver's age might have in a railroad-crossing collision." Pet. App. 5a.

III. RESPONDENTS FAIL TO REFUTE PETITIONER'S ARGUMENT THAT THE PUNITIVE DAMAGES AWARD IN THIS CASE IS CONSTITUTIONALLY EXCESSIVE AND CONTRIBUTES TO A SPLIT IN AUTHORITY OVER THE PROPER PROPORTIONALITY ANALYSIS UNDER *BMW V. GORE*.

In Respondents' effort to obscure the inconsistent manner in which lower federal and state courts have implemented the *Gore* proportionality analysis, they misstate the law of Idaho regarding punitive damages. *See* Opp. at 12. In its petition, Conrail correctly identified Idaho as one of the minority of jurisdictions that has looked to all compensatory damages in a case – even those for claims not subject to punitive damages – when determining whether punitive damages exceed constitutional proportions. *See Walston v. Monumental Life Ins. Co.*, 923 P.2d 456 (Idaho 1996). In *Walston*, the court analyzed the proportionality between *all* compensatory damages (including those for a contract claim) and the punitive damages, *see id.* at 468, although punitives were not awarded for the contract claim but only for two tort claims, *see id.* at 459-60. Therefore, Respondents' attempt to hide the confusion and inconsistency that plagues the lower federal and state courts that must undertake the *Gore* proportionality analysis is unsupported by its misleading references to Idaho law.

Respondents' superficial defense of the Ohio Supreme Court's own superficial *Gore* analysis is similarly telling. Respondents devote but a single paragraph to the heart of Conrail's argument on this point – the *Gore* proportionality factor – and even then, by merely echoing the Ohio court's conclusion ("the ratio between compensatory and punitive damages [is] less relevant here

because of the egregiousness of the act," Opp. at 9), confirm that the state court disregarded this critical factor. And, Respondents simply repeat the court's *ipse dixit* that, under *Gore's* third guidepost, a $15,000,000 punitive damages award for $2,400 of property damages is comparable to the civil and criminal penalties that could be imposed for similar conduct. There is no support for these propositions in either this Court's precedents or the factual record of this case. Moreover, contrary to Respondents' assertion, Petitioner does not seek to impose a "mindless . . . mathematical litmus test" on state courts. Opp. at 14. Rather, it seeks only a proper adherence to the *Gore* framework and consistency in the application of its guideposts to ensure that the due process principles established by this Court are afforded to all litigants in state and federal courts.

CONCLUSION

The problem posed in this case is not isolated, as revealed by the *amicus* briefs. Interstate operations like railroads repeatedly are subjected to enormous damage awards that are the product of flawed judicial processes. For example, campaign contributions by local lawyers and their affiliates to judges who have cases pending before them raise a fundamental due process issue that arises often and creates a continuing perception, not only by the public but also by the bar, that the judicial process is not even-handed. This Court just last month recognized the perception problems posed by substantial contributions to a political campaign in *Nixon v. Shrink Missouri Government PAC*. That problem pales by comparison to the issues created when jurists hearing a dispute are the beneficiaries of direct and multiple contributions from

the lawyers on one side of a case, especially when those contributions are made after an appeal has been filed, and where the court does not assure the litigants that it can even-handedly resolve the case, even after the matter is brought to its attention. Respondents do not remotely suggest that this is not a significant problem. Instead, they argue that the contributions do not rise to the level of a due process violation. That contention merely begs the question whether the Court should decide the issue. And, the answer to that question is clear: yes.

For the foregoing reasons and for the reasons set forth in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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